

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**January 14, 2015**

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. 2014AP1936**

**Cir. Ct. No. 2013TR11782**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**IN THE MATTER OF THE REFUSAL OF ROBYN M. POLLACK:**

**FOND DU LAC COUNTY,**

**PLAINTIFF-RESPONDENT,**

**v.**

**ROBYN M. POLLACK,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Fond du Lac County:  
GARY R. SHARPE, Judge. *Affirmed.*

¶1 GUNDRUM, J.<sup>1</sup> Robyn Pollack appeals from the circuit court’s order revoking her driver’s license based upon her refusal to submit to a chemical test following her arrest for operating a motor vehicle while intoxicated (OWI). Pollack does not dispute that she refused to submit to the chemical testing, but contends the court erred in finding her refusal improper. She argues that the arresting officer did not have the requisite probable cause to arrest her for OWI and request that she submit to the testing. We disagree and affirm.

### *Background*

¶2 The Fond du Lac County sheriff’s deputy who arrested Pollack was the only person to testify at the refusal hearing, and he testified, in relevant part, as follows. At approximately 3:00 a.m. on December 1, 2013, the deputy observed a vehicle, operated by Pollack, traveling northbound “in both lanes of the southbound lane” of U.S. Highway 151. Stopping the vehicle and making contact with Pollack, the deputy observed Pollack’s eyes to be glassy and detected an odor of alcohol “emanating from her breath.” The deputy asked Pollack to perform field sobriety tests, which she agreed to do.

¶3 Pollack exited the vehicle, and the deputy asked her if she had been drinking, to which Pollack responded that she had had “a couple.” The deputy asked her what she had been drinking and she stated “diet and Captain’s.” When the deputy asked her to clarify what “a couple” meant, Pollack responded, “We’ll go with that.”

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<sup>1</sup> 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.

¶4 The first field sobriety test Pollack performed was the horizontal gaze nystagmus test (HGN), during which the deputy observed the reaction of Pollack’s eyes to a pen he used as a stimulus. During this test, the deputy observed six “clues” of intoxication: “a lack of smooth pursuit in the left and the right eye, distinct and sustained nystagmus in the left and right eye, and onset of nystagmus prior to 45 degrees.”

¶5 The deputy also had Pollack perform two “divided attention” tests, the walk-and-turn and one-leg-stand tests. On the walk-and-turn test, the deputy observed two out of eight possible “clues”—that Pollack “stepped off [the] line on her first set of nine [steps], and she also stopped walking before starting her second set of nine heel-to-toe steps,” inquiring which way she should turn. The deputy observed no clues during the one-leg-stand test.

¶6 The deputy then asked Pollack to perform a preliminary breath test (PBT) and Pollack questioned if she had to perform the test. The deputy responded that it was “up to her” and that he was not going to and did not have the authority to force her to perform the test. She did not take the PBT, and the deputy then arrested Pollack for OWI.

¶7 On cross-examination, the deputy testified that Pollack told him at the scene that she had been driving in the wrong direction on the highway because her phone, “assum[edly] ... the GPS on her phone,” gave her the wrong directions. He further testified that Pollack appeared nervous when he observed her in her vehicle. He confirmed that “rotating lights” on a police vehicle could possibly impact the HGN test. He testified that the lights on his vehicle were in the front grill and windshield, adding “[t]here are no overhead lights.” He further testified that the lights on his vehicle were on and facing south and recalled that Pollack

was facing west. He acknowledged that current law enforcement instruction is that a subject should “face away from the lights” or the lights should be turned off. He also indicated that he did not observe balance or motor coordination problems with Pollack prior to starting the field sobriety tests.

¶8 It was undisputed that Pollack refused to submit to chemical testing following her arrest. At the conclusion of the hearing, the circuit court held that Pollack’s refusal to submit to chemical testing was improper because the deputy had probable cause to believe Pollack had been operating her vehicle while under the influence of alcohol. Pollack appeals.

### *Discussion*

¶9 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 the sole issue before us on appeal is whether the deputy had probable cause to believe Pollack had been operating a motor vehicle while under the influence of alcohol.

¶10 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).

¶11 At the time he arrested Pollack, the deputy was aware (1) Pollack had driven the wrong direction "in both lanes" on a highway at 3:00 a.m.; (2) her breath smelled of alcohol and she had glassy eyes; (3) she appeared nervous about her encounter with the deputy; (4) she admitted to consuming "a couple" "diet and Captain's," but deliberately avoided disclosing how many; (5) she displayed six clues of intoxication on the HGN field sobriety test<sup>2</sup> and two clues on the walk-and-turn test; and (6) she indicated a clear desire not to provide a requested breath sample for the PBT.

¶12 We conclude that the deputy had probable cause to arrest Pollack. The deputy observed Pollack driving "in both lanes of the southbound lane" going northbound on U.S. Highway 151. Even if Pollack's phone told her to turn onto this highway, most sober people would operate in only one lane at a time and in a

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<sup>2</sup> The circuit court acknowledged Pollack's challenge to the deputy's observation of six clues during the HGN test based upon the fact Pollack was not facing entirely away from the police vehicle lights during the test; however, the court noted that the lights were "not on top of the vehicle." Despite Pollack's challenge, the court concluded that the HGN test was nonetheless appropriate and effective "in discerning the existence of nystagmus and there were, in fact ... six out of six clues." The court's finding that Pollack exhibited six clues indicating intoxication on the HGN test is supported by the evidence and is not clearly erroneous.

northbound lane to head northbound. Further, the time was 3:00 a.m., a time of day more often associated with intoxicated driving. See *State v. Post*, 2007 WI 60, ¶36, 301 Wis. 2d 1, 733 N.W.2d 634 (poor driving around “bar time” lends to suspicion that operator is driving while intoxicated). The deputy observed Pollack to be nervous, smelled alcohol on her breath, and noticed that her eyes were glassy, supporting her admission that she had “a couple” “diet and Captain’s.” By refusing to tell the deputy how many “diet and Captain’s” she had consumed and showing clear reluctance to provide a breath sample, Pollack displayed consciousness of her guilt, i.e., that she knew she had consumed an amount of alcohol that might make her operation of her vehicle at that time illegal and did not want the deputy to discover this.

¶13 We are satisfied from the totality of the circumstances that the deputy could reasonably infer that Pollack operated her vehicle while under the influence of an intoxicant and thus that he had probable cause to arrest her and request a blood sample for chemical testing. The “facts faced by the officer” were “sufficient to lead a reasonable officer to believe that guilt [was] more than a possibility.” *Sharpee*, 154 Wis. 2d at 518 (citation omitted).

*By the Court.*—Order affirmed.

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

