COURT OF APPEALS DECISION DATED AND FILED

October 15, 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. 98-1716-FT

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

IN THE MATTER OF THE REFUSAL OF JACKIE L. PUTSKEY,

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JACKIE L. PUTSKEY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waushara County: LEWIS MURACH, Judge. *Affirmed.*

EICH, J.[1] Jackie L. Putskey appeals from an order revoking her driving privileges for refusing to submit to a breath test, and from the denial of her

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

motion to dismiss the refusal charge. She argues that the arresting officer lacked probable cause to administer a preliminary breath test, and that she was "under-informed" as to her rights by the officer, in violation of various provisions of the implied consent law. We reject her arguments and affirm the order.[2]

The officer, Sergeant Russell Monacelli of the Waushara County Sheriff's Department, was dispatched to a one-car "rollover" accident at 1:30 a.m. on a Sunday morning. Upon his arrival, he observed a heavily damaged, upside-down vehicle in a ditch on the side of the road, skidmarks on the road, and a dead deer. Putskey identified herself as the driver. According to Monacelli, Putskey's balance was unsteady and she swayed back and forth as she walked toward him. Talking to her, he detected a strong odor of intoxicants on her breath and noted that her speech was slurred. When he asked her where she had been going, her account of the direction in which she had been traveling directly contradicted what Monacelli could plainly ascertain from the direction of her car's skidmarks.

Monacelli administered a preliminary breath test ("PBT") to Putskey, which indicated a blood-alcohol level of .20 percent. After having Putskey perform two field sobriety tests, which she failed, he arrested her for driving while intoxicated. He took her to the sheriff's department and, once there, read the "informing-the-accused" form to her. Based on the testimony of another officer (Putskey did not testify at the refusal hearing), Putskey asserts that Monacelli also told her that if she refused to submit to a chemical test of her breath, her driver's license would be "suspended." She refused the test, and was charged with violating § 343.305(9), STATS.

[2] Pursuant to this court's order dated July 10, 1998, this case was submitted to the court on the expedited appeals calendar. *See* RULE 809.17, STATS.

Putskey's motion to dismiss the refusal charge on grounds that Monacelli lacked probable cause to administer the PBT was denied. At the refusal hearing, she argued that she was "under-informed" as to the consequences of a refusal to submit to chemical testing because she was told that her license would be "suspended," not "revoked" as required by the informed consent law. Putskey did not testify at the hearing; her argument was based on the testimony of another officer as to his recollection of a conversation between Monacelli and Putskey. The trial court found that she improperly refused the test. Other facts will be discussed below.

I. Probable Cause

An officer may request an individual to submit to a PBT if the officer has probable cause to believe that the individual has been driving while intoxicated. *See* § 343.303, STATS. It then becomes part of the "totality of circumstances" which the officer considers in determining whether or not to effectuate the arrest. ***County of Dane v. Sharpee,*** 154 Wis.2d 515, 520, 453 N.W.2d 508, 511 (Ct. App. 1990). The PBT, however, is not the sole determinant of probable cause to arrest. ***Id.***

And while no cases exist outlining a distinct probable-cause test for administering a PBT, we need not explore that subject here because we are satisfied that, even without the PBT test results, Monacelli had probable cause to arrest Putskey for driving while intoxicated.

Probable cause is a question of probability and plausibility. It is a common sense test, based on "considerations of everyday life on which reasonable and prudent persons, not legal technicians, act." ***State v. Truax,*** 151 Wis.2d 354, 360, 444 N.W.2d 432, 435 (Ct. App. 1989). It is a "measure of the plausibility of

particular conclusions about human behavior—conclusions that need not be unequivocally correct or even more likely correct than not." ***State v. Pozo***, 198 Wis.2d 705, 711, 544 N.W.2d 228, 231 (Ct. App. 1995) (citations and quoted sources omitted). The objective facts before the officer need only lead to the conclusion that guilt is more than a possibility. ***State v. Richardson***, 156 Wis.2d 128, 148, 456 N.W.2d 830, 838 (1990).

Probable cause to arrest exists where the officer, at the time of the arrest, has knowledge of facts and circumstances sufficient to warrant a person of reasonable prudence to believe that the person arrested is committing, or had committed, an offense. ***Sharpee,*** 154 Wis.2d at 518, 453 N.W.2d at 510. We measure the quantum of information that constitutes probable cause to arrest by the facts of the particular case, ***State v. Wilks***, 117 Wis.2d 495, 502, 345 N.W.2d 498, 501 (Ct. App. 1984), and in making that measurement, we look to the totality of the circumstances within the officer's knowledge at the place and time of the arrest. ***State v. Koch***, 175 Wis.2d 684, 701, 499 N.W.2d 152, 161 (1993). Whether the established facts constitute probable cause presents a question of law which we review *de novo*. ***State v. Babbitt***, 188 Wis.2d 349, 356, 525 N.W.2d 102, 104 (Ct. App. 1994).

The facts facing Monacelli—the early-morning hours, the evidence of the single-car accident, Putskey's unsteady balance, the smell of intoxicants on her breath, her swaying gait and slurred speech, her factually contradictory explanation of the accident, and Monacelli's experience in confronting intoxicated drivers on weekend nights[3]—perhaps insufficient, standing alone, to constitute

[3] *See* ***State v. Wille***, 185 Wis.2d 673, 683, 518 N.W.2d 325, 329 (Ct. App. 1994) (an officer's conclusions which are based on his or her experience may be considered when determining probable cause).

probable cause to arrest, are sufficient, when taken together, to do so. We think this is especially so in light of Putskey's performance on the field sobriety tests. We are satisfied that totality of the circumstances facing Monacelli that night—exclusive of the PBT test—could reasonably lead him to believe that Putskey probably had been driving while intoxicated.

II. Putskey's Refusal to Submit to Testing

Putskey next argues that she was justified in refusing to submit to the chemical test because she was "under-informed" as to her rights, in violation of the implied consent law. The law expressly directs officers, when requesting a person to take a chemical test, to orally inform the person of the information contained in § 343.305(4), STATS., which states in part that "if testing is refused, ... the person's operating privileges will be revoked." Section 343.305(4)(b), STATS. In order to successfully challenge the sufficiency of the warning given by an officer under the implied consent law, an accused driver must establish that: (1) the requesting officer either failed to meet or exceeded his or her duty to inform the accused under § 343.305(4); (2) the lack or oversupply of information was misleading; and (3) the driver's ability to make the choice about whether to submit to chemical testing was affected. ***County of Ozaukee v. Quelle***, 198 Wis.2d 269, 280, 542 N.W.2d 196, 200 (Ct. App. 1995). Interpretation of the implied consent law, and its application to undisputed facts, present questions of law which we review independently. ***State v. Sutton***, 177 Wis.2d 709, 713, 503 N.W.2d 326, 328 (Ct. App. 1993).

While it is undisputed that Monacelli read the informing-the-accused-form to Putskey *verbatim*—and that the form indicates that a refusal will

result in revocation of one's driving privileges[4]—Putskey clams that Monacelli also told her that if she refused to take the test, her driver's license would be "suspended." This extra and misleading information, she claims, under-informed her as to the true consequences of a refusal, and thus satisfies the first two elements of the ***Quelle*** test—sufficiently establishing that Monacelli did not provide adequate informed consent.[5]

In advancing the argument, Putskey relies solely on the testimony of Deputy Thomas Duket, who was the on-duty Intoxilyzer operator when she was brought to police headquarters after her arrest. Acknowledging that he could not specifically remember the discussion between Monacelli and Putskey, Duket testified that "[Monacelli] said something to the effect ... that if [Putskey] refused to take the test, her operating privileges would be suspended." He stated at another point in his testimony that providing this information is "something that always happens." Monacelli testified that he read the form to Putskey, but did not recall having any discussion with her as to the ramifications of a refusal.

Duket's testimony is vague and subject to at least two interpretations: (a) that officers always inform the accused as to the ramifications of refusing a test; or (b) that they always advise the accused that a refusal will result in a suspension. To the extent Duket's testimony creates an evidentiary conflict, it has been resolved by the trial court. The court, recognizing the ambiguity in Duket's testimony, stated that it was "not very clear ... to the extent

[4] The form specifically states, in part, "[I]f you refuse to submit to any [chemical testing of your breath, blood or urine] your operating privilege will be revoked."

[5] The third prong of test—whether the driver's ability to make the choice about whether to submit to the test was affected—requires a fact-finding process by the trier of fact. ***State v. Ludwigson***, 212 Wis.2d 871, 876, 569 N.W.2d 762, 764 (Ct. App. 1997).

to which his remarks were directed"—and then determined that the State had not violated the implied consent law and that Putskey improperly refused to take the chemical test. We consider that a finding of fact that, under the circumstances, Monacelli did not misinform Putskey under the law; and we will not reverse a trial court's finding of fact unless it is clearly erroneous. Section 805.17(2), STATS.; ***State v. Kieffer***, 207 Wis.2d 462, 474, 558 N.W.2d 664, 670 (Ct. App. 1996).

Putskey has failed to establish that Monacelli mis- or under-informed her as to the consequences of refusing to take a chemical test.

By the Court.—Order affirmed.

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