

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**June 18, 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. 2015AP180**

**Cir. Ct. No. 2014TR7899**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

---

**IN THE MATTER OF THE REFUSAL OF KIRK L. GRIESE:**

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**KIRK L. GRIESE,**

**DEFENDANT-APPELLANT.**

---

APPEAL from a judgment of the circuit court for Dodge County:  
JOHN R. STORCK, Judge. *Affirmed.*

¶1 SHERMAN, J.<sup>1</sup> Kirk Griese appeals a judgment of the circuit court for unlawfully refusing to take a test for intoxication after arrest, contrary to WIS.

---

<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

STAT. § 343.305(9)(a). Griese contends the circuit court erred in concluding that the officer who arrested him for operating a motor vehicle while under the influence of an intoxicant had probable cause to believe that he had operated a motor vehicle while under the influence of an intoxicant and therefore his refusal was not proper. For the reasons discussed below, I affirm.

### **BACKGROUND**

¶2 In October 2014, Griese was provided with a notice of intent to revoke his operating privileges for refusing to submit to a blood test, contrary to WIS. STAT. § 343.305(3)(a). *See* WIS. STAT. § 343.305(9).<sup>2</sup> Griese requested a hearing on his refusal.

¶3 At the refusal hearing, Robbie Weinfurter, an officer with the Dodge County Sheriff's Department, testified that on October 24, 2014, at approximately 6:18 p.m., he was dispatched to investigate a report that an individual riding a motorcycle had tipped the motorcycle over before proceeding to a bar named The Hill. Officer Weinfurter testified that when he arrived at the Hill Tavern, he made contact with Griese who was speaking with another officer. Officer Weinfurter testified that he learned from the other officer that Griese had thrown the keys to his motorcycle on the ground, which were found by the other officer, and that he observed damage to Griese's motorcycle consistent with the bike having been tipped over or scraped on the road. Officer Weinfurter testified that when he spoke with Griese, he observed that Griese "had a strong odor of intoxicating

---

<sup>2</sup> WISCONSIN STAT. § 343.305(9)(a) provides in relevant part: "If a person refuses to take a test under sub. (3)(a), the law enforcement officer shall immediately prepare a notice of intent to revoke ...."

beverage coming through his breath,” Griese’s eyes were bloodshot and watery, and that while he spoke with Griese, he could “noticeably see [Griese] swaying in all directions.” Officer Weinfurter testified that Griese “told [him] that [Griese] had not had anything to drink at the bar,” and that Griese admitted that he had been drinking before he came to the bar. On redirect, Officer Weinfurter testified that the other officer had informed him that a bartender had indicated that Griese “had ordered one drink at the bar ... [a] Bacardi and Coke,” and that Griese had consumed “approximately one inch” out of the “small glass.”

¶4 Officer Weinfurter testified that he asked Griese to perform field sobriety tests and a preliminary breath test (PBT), but that Griese refused both. Officer Weinfurter testified that after Griese refused, he placed Griese under arrest for operating a motor vehicle while under the influence of an intoxicant based upon his observations and the information he had on Griese’s driving prior to arriving at the tavern.

¶5 The circuit court determined that Officer Weinfurter had probable cause to believe that Griese had been operating his motorcycle while under the influence of alcohol, and that Griese’s refusal to submit to a blood test was not reasonable. Griese appeals.

## DISCUSSION

¶6 At a hearing on a defendant’s refusal to submit to a chemical test for intoxication, the circuit court must determine: (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 only issue raised by Griese in this case is whether Officer Weinfurter had probable cause to believe Griese had been operating a motor vehicle while under the influence of an intoxicant.<sup>3</sup>

¶7 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 is 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 ... 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).

¶8 Griese concedes that he had been operating his motorcycle and that there was sufficient evidence for a reasonable officer to believe that he was intoxicated when Officer Weinfurter made contact with him. Griese argues, however, that Officer Weinfurter did not have sufficient facts before him to believe that Griese had been intoxicated *while* Griese was driving his motorcycle. I disagree.

¶9 Officer Weinfurter testified that only thirty-one minutes passed between the time he was dispatched to investigate the report that a motorcycle had tipped over and the time that he placed Griese under arrest. Griese admitted that

---

<sup>3</sup> It is uncontested that Griese was informed of his rights and responsibilities and that he refused to submit to a test for intoxication.

he had been drinking prior to arriving at the bar and Officer Weinfurter had information that Griese had consumed only a small amount of alcohol while at the bar. When Officer Weinfurter made contact with him, Griese smelled “strong[ly]” of intoxicants, his eyes were bloodshot and watery, and he was unstable on his feet, and Griese failed to cooperate with Officer Weinfurter’s requested field sobriety tests and a PBT.<sup>4</sup> Officer Weinfurter was also aware that Griese had tipped his motorcycle over while driving it, and Officer Weinfurter testified that Griese tried to minimize the significance of his accident.

¶10 I am satisfied that under the totality of the circumstances, it was reasonable for Officer Weinfurter to believe that when Griese had been driving to the bar, he had been doing so while under the influence of an intoxicant. Accordingly, I conclude that Griese’s refusal to submit to the PBT was not reasonable and I affirm the judgment of conviction.

*By the Court.*—Judgment affirmed.

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

---

<sup>4</sup> See *State v. Babbitt*, 188 Wis. 2d 349, 363, 525 N.W.2d 102 (Ct. App. 1994) (“a defendant’s refusal to submit to [a field sobriety] test may be used as evidence of probable cause to arrest”).

