COURT OF APPEALS
DECISION
DATED AND FILED

September 30, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-1095

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

COUNTY OF IOWA,

PLAINTIFF-RESPONDENT,

V.

BROCK T. BILSE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Iowa County: WILLIAM D. DYKE, Judge. *Affirmed.*

DYKMAN, P.J.[1] Brock T. Bilse appeals from a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant, contrary to § 346.63(1)(a), STATS. Bilse argues that the trial court erred by not granting his motion to suppress all evidence gathered after his

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

preliminary breath test (PBT). He contends that the PBT was not supported by probable cause because it was administered before the field sobriety tests. We disagree and affirm. Bilse also challenges the constitutionality of a blood test administered pursuant to Wisconsin's implied consent law, § 343.305, STATS. Since Bilse has not shown that he provided notice to the attorney general, as required when challenging the constitutionality of a statute, we do not review the issue.

I. Background

On August 23, 1998, at approximately 2:05 a.m., Iowa County Sheriff's Deputy Lin Gunderson observed a car weaving back and forth in its lane in front of him. Gunderson followed the vehicle and saw it drive onto the shoulder four times. Gunderson pulled the car over and approached it on the passenger side. While talking with the three occupants, Gunderson noticed the odor of intoxicants coming from inside the car. Bilse, the driver, said that he had not been drinking and explained that someone who had been in the car earlier had spilled some beer. Gunderson asked Bilse to get out of the car. When he did so, Bilse swayed back and forth and had difficulty maintaining his balance. Gunderson noted that he was not wearing shoes. Bilse again denied consuming alcohol, but Gunderson observed that Bilse's speech was slurred, his breath smelled of intoxicants, and his eyes were slightly bloodshot and glassy.

At that point, Gunderson administered a PBT. He then asked Bilse to perform several field sobriety tests. After Bilse performed poorly on the sobriety tests, Gunderson placed him under arrest for operating a motor vehicle while intoxicated. Gunderson brought him to the hospital in order to obtain a blood sample. Gunderson read Bilse the "Informing the Accused" statement as

required by Wisconsin's implied consent law, § 343.305(4), STATS., and Bilse consented to a blood test. After Bilse's blood was drawn, Gunderson returned him to the Sheriff's department.

Bilse filed pretrial motions to suppress all evidence gathered as a result of his arrest and to suppress the blood sample. Bilse argued that, since the PBT had been administered before the sobriety tests, it was not supported by probable cause and amounted to an unlawful arrest. He also argued that Gunderson could have required Bilse to take a breath test instead of a blood test. The blood test was therefore unreasonably intrusive and violated the Fourth Amendment because it was not necessitated by exigent circumstances. The trial court denied the motions. After a stipulated trial, the court found Bilse guilty of operating a motor vehicle while under the influence of an intoxicant. Bilse appeals his conviction.

II. Analysis

A. Probable Cause for the PBT

Bilse argues that the trial court erred when it determined there was probable cause for Gunderson to administer the PBT. Bilse points out that Gunderson did not administer the sobriety tests until after the PBT, so they cannot be a factor in a probable cause analysis. Without the sobriety tests, Bilse argues, the circumstances would not allow a reasonable officer to conclude that he had been driving while intoxicated.

In order to administer a PBT, a police officer must have probable cause to arrest. *See* ***County of Jefferson v. Renz***, 222 Wis.2d 424, 443, 588 N.W.2d 267, 276 (Ct. App. 1998), *review granted*, 222 Wis.2d 673, 589 N.W.2d

628 (1998). Whether undisputed facts constitute probable cause to arrest is a question of law that we review de novo. *See* ***State v. Babbitt***, 188 Wis.2d 349, 356, 525 N.W.2d 102, 104 (Ct. App. 1994). We examine the totality of the circumstances facing the arresting officer at the time to determine whether a reasonable officer, under the same circumstances, would believe that the defendant committed a crime or violated a traffic statute. *See* ***id.*** The circumstances do not have to demonstrate proof beyond a reasonable doubt or that guilt is more likely than not, but merely that a reasonable officer would conclude that the defendant probably operated a motor vehicle while under the influence of an intoxicant. *See* ***id.*** at 357, 525 N.W.2d at 104. An officer is not required to administer field sobriety tests before determining whether there is probable cause to arrest. *See* ***State v. Wille***, 185 Wis.2d 673, 684, 518 N.W.2d 325, 329 (Ct. App. 1994).

We conclude that Gunderson had probable cause to arrest Bilse at the time he administered the PBT even though he had not yet asked Bilse to perform the sobriety tests. Before he administered the PBT, Gunderson observed six indications that Bilse was intoxicated: (1) while driving, Bilse weaved back and forth in his lane and drove onto the shoulder four times; (2) the inside of the car smelled of intoxicants; (3) when he got out of the car, Bilse swayed back and forth and had difficulty maintaining his balance; (4) Bilse slurred his speech; (5) his breath smelled of alcohol; and (6) his eyes were slightly bloodshot and glassy. There may be innocent explanations for some of these observations, but, as a whole, they are sufficient to permit a reasonable police officer to conclude that Bilse had probably been driving while under the influence of alcohol, in violation of § 346.63(1)(a), STATS.

Bilse asserts that probable cause to arrest cannot exist in this case without the evidence from the sobriety tests.[2] He argues that his case can be distinguished from ***Wille***, in which we held that probable cause to arrest existed even without sobriety tests. ***Id.*** at 683-84, 518 N.W.2d at 329. In ***Wille***, the defendant smelled of alcohol, rear-ended a car parked on the shoulder of a highway and told the arresting officer, "I've got to quit doing this." ***Id.*** at 684, 518 N.W.2d at 329. Bilse asserts that the facts of his case compare more favorably with those of ***Renz***, in which we concluded that an officer did not have probable cause to administer a PBT. ***Renz***, 222 Wis.2d at 447, 588 N.W.2d at 278. In ***Renz***, the inside of the defendant's car smelled of alcohol, the defendant admitted he had consumed three beers earlier in the evening and the defendant exhibited some signs of unsteadiness in performing several sobriety tests. ***Id.*** at 428-29, 588 N.W.2d at 270-71.

The facts of this case can be distinguished from those in both ***Wille*** and ***Renz***, but this does not mean that probable cause cannot exist without sobriety tests. In ***Babbitt***, we concluded that an officer had probable cause to arrest the defendant even without sobriety tests. ***Babbitt***, 188 Wis.2d at 358, 525 N.W.2d at 105. The defendant had been driving erratically, the inside of her car smelled of alcohol, her eyes were bloodshot and glassy, she walked slowly and deliberately to the rear of the car, and she displayed an uncooperative attitude towards the arresting officers. *See* ***id.*** at 357, 525 N.W.2d at 104. The facts surrounding

[2] Bilse also appears to suggest that a police officer should always administer field sobriety tests before making a probable cause determination. As Bilse acknowledges, this proposition runs counter to our conclusion in ***State v. Wille*** that an officer is not required to administer sobriety tests before determining whether there is probable cause to arrest. ***State v. Wille***, 185 Wis.2d 673, 684, 518 N.W.2d 325, 329 (Ct. App. 1994). Bilse has not fully developed this argument and we decline to address it any further. *See* ***State v. Pettit***, 171 Wis.2d 627, 647, 492 N.W.2d 633, 642 (Ct. App. 1992).

Bilse's arrest do not mirror those of ***Wille***, ***Renz*** or ***Babbitt***, but Bilse exhibited as many, if not more, indications of intoxication as the defendant in ***Babbitt***. Gunderson had probable cause to arrest before he administered the PBT and the sobriety tests.

B. Blood Test

Bilse argues that the blood test administered after his arrest violated the Fourth Amendment of the United States Constitution. He contends that the test was an unreasonable seizure of evidence since the Iowa County Sheriff's Department could have used a less intrusive breath test. He also asserts that the warrantless blood draw was not justified by exigent circumstances because, in his case, a breath test would have more quickly provided the same evidence.

Bilse bases his challenge of the blood test on the Ninth Circuit decision in ***Nelson v. City of Irvine***, 143 F.3d 1196 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 444 (1998). In that case, the Ninth Circuit held that when an arrestee consents to a breath or urine test, and such tests are available, to require a blood test is a violation of the Fourth Amendment because it is unreasonable and not justified by exigent circumstances. *See* ***id.*** at 1207. However, in ***Nelson***, the court addressed California's implied consent law, which, at the time, allowed the arrestee to choose between a blood, breath or urine test. ***Id.*** at 1201. In contrast, Wisconsin's implied consent law allows the law enforcement agency to designate which test will be administered first. *See* § 343.305(2), STATS. Gunderson's decision to administer a blood test was thus justified by statute.

Essentially, Bilse challenges the constitutionality of Wisconsin's implied consent law. When the constitutionality of a statute is challenged, the attorney general must be notified and given an opportunity to be heard. *See*

Midwest Mut. Ins. Co. v. Nicolazzi, 138 Wis.2d 192, 202, 405 N.W.2d 732, 737 (Ct. App. 1987). There is no record evidence that Bilse has notified the attorney general and we therefore do not review this issue.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports. *See* RULE 809.23(1)(b)4, STATS.