

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 9, 2016

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. 2016AP256
2016AP257**

**Cir. Ct. No. 2015TR8383
2015TR8384**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

VILLAGE OF BAYSIDE,

PLAINTIFF-RESPONDENT,

v.

AMBER E. SCHOELLER,

DEFENDANT-APPELLANT

IN THE MATTER OF THE REFUSAL OF AMBER E. SCHOELLER:

VILLAGE OF BAYSIDE,

PLAINTIFF-RESPONDENT,

v.

AMBER E. SCHOELLER,

DEFENDANT-APPELLANT.

APPEALS from a judgment and an order of the circuit court for Milwaukee County: T. CHRISTOPHER DEE, Judge. *Affirmed.*

¶1 BRASH, J.¹ In these consolidated appeals, Amber Schoeller appeals an order finding that she impermissibly refused to submit to an evidentiary chemical breath test.² She also appeals a judgment finding her guilty of operating a motor vehicle under the influence of an intoxicant. Schoeller makes the following arguments on appeal: (1) Sergeant Francesca Ehler, the arresting officer, did not have the requisite level of suspicion to request that Schoeller perform a preliminary breath test (PBT) and, without the PBT test result, Ehler did not have probable cause to arrest Schoeller; and (2) without the refusal to submit to the chemical breath test there was insufficient evidence to support the circuit court's finding of guilt. We disagree and affirm.

BACKGROUND

¶2 On January 24, 2015, at approximately 2:30 a.m., Sergeant Francesca Ehler of the Bayside Police Department was on patrol on West Brown Deer Road. Ehler observed a vehicle make a U-turn at the intersection of West Brown Deer Road and North Port Washington Road, contrary to two clearly posted signs prohibiting U-turns at that intersection. Schoeller was driving the vehicle that made the illegal U-turn.

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

² On June 27, 2016, we ordered the captioned appeals consolidated.

¶3 Upon observing Schoeller make the prohibited U-turn, Ehler attempted to initiate a traffic stop. After Ehler activated her emergency lights, Schoeller did not immediately stop. Instead, Schoeller pulled into a left turning lane on West Brown Deer Road before returning to the left hand lane of traffic and proceeding through the intersection. Schoeller ultimately stopped her vehicle in the left hand turn on West Brown Deer Road at the intersection of Spruce Road. Ehler did not observe any reason that Schoeller could not have immediately pulled over to the right when Ehler activated her emergency lights.

¶4 Upon making contact with Schoeller, Ehler detected the odor of intoxicants and observed Schoeller's eyes to be bloodshot and glassy. Schoeller admitted to having one drink that evening. Ehler asked Schoeller if she knew the alphabet; Schoeller indicated that she did. Ehler then instructed Schoeller to say the alphabet from A to Z. Schoeller stopped at B on both of her attempts, saying that she could not repeat the alphabet because Ehler was making her nervous. Based on these observations, and Schoeller's admission to drinking, Ehler asked Schoeller to vacate the vehicle and perform field sobriety tests.

¶5 During the horizontal gaze nystagmus (HGN) test, Ehler observed that Schoeller had a lack of smooth pursuit, distinct and sustained nystagmus at maximum deviation, and nystagmus prior to 45 degrees in both eyes. During the walk-and-turn test, Schoeller took twelve steps instead of nine as instructed, made a turn contrary to instructions, lost her balance and stepped off the imaginary line, and took fifteen steps on her return. Furthermore, Schoeller did not make heel-to-toe contact on most of her steps in both directions, leaving three to four inches of space between her feet. Although Schoeller stated she had broken her right leg three years prior, she did not object to taking the test. During the one leg stand

test, Schoeller skipped the number eleven while counting and lost her balance at the count of twenty, causing her to put her foot down.

¶6 Thereafter, Ehler asked Schoeller to consent to a PBT. Schoeller declined to do so. Based on Ehler's observations and Schoeller's performance on the field sobriety tests, Ehler arrested Schoeller for operating a motor vehicle while intoxicated.

¶7 Ehler transported Schoeller to the Bayside police department, conducted a twenty minute observation in preparation for the chemical breath test, and read Schoeller the Informing the Accused form. Schoeller refused to submit to the evidentiary chemical breath test. Schoeller gave no reason for her refusal. Officer Christopher Janssen was present for Schoeller's refusal. Subsequently, Ehler issued Schoeller citations for operating while intoxicated (OWI) in violation of Bayside, Wis., Ordinance 98-1, adopting WIS. STAT. § 346.63(1)(a), for making an illegal U-turn, and for improperly refusing to take an evidentiary chemical breath test.

¶8 Schoeller was charged in the Village of Bayside Municipal Court with operating a motor vehicle while under the influence of an intoxicant contrary to WIS. STAT. § 346.63(1)(a) and refusing to submit to the evidentiary chemical breath test contrary to WIS. STAT. §§ 343.305(9) and (10). Schoeller filed a request for a refusal hearing, which was held on May 12, 2015. The municipal court found that Schoeller unlawfully refused to submit to the evidentiary chemical breath test, and further found Schoeller guilty of operating a motor vehicle while under the influence of an intoxicant.

¶9 Schoeller timely filed an appeal to the circuit court pursuant to WIS. STAT. § 800.14 appealing both the guilty verdict and the finding that Schoeller unlawfully refused to submit to the evidentiary chemical breath test.³ On November 2, 2015, the circuit court held a refusal hearing and a bench trial on Schoeller's OWI and U-turn citations. After the hearing and trial, the circuit court found that Schoeller improperly refused to take the evidentiary chemical breath test. The circuit court based this ruling on specific factual findings that included:

- Ehler's 23 years of experience and familiarity with the area she was patrolling;
- Schoeller's illegal U-turn;
- Schoeller's "kind of weird" driving in response to Ehler's emergency lights;
- Schoeller's inability to recite the alphabet despite being highly educated;
- the odor of intoxicants and Schoeller's glassy eyes;
- the HGN test's indication of an intoxicant; and
- Schoeller's performance on the walk-and-turn and one leg stand tests.

The circuit court concluded that these facts justified Ehler's request that Schoeller submit to a PBT. The circuit court further concluded that Schoeller improperly refused to take an evidentiary chemical test of her breath.

¶10 The circuit court also found Schoeller guilty of operating while intoxicated, stating:

³ This is an appeal of the circuit court's ruling. As such, we will not discuss the municipal court proceedings further.

As to the OWI, I find under standards of clear, satisfactory, and convincing evidence, all that information I've gone over already, I won't go over it again, there is a refusal.

Now people can look at that as consciousness of guilt, just being cranky, not wanting to cooperate. I suspect there may be professional reasons involved for Doctor Schoeller as well. I don't know.

Certainly I can take it as consciousness of guilt, and add to it all of the observations made by the Sergeant and certainly, in some respects, confirmed by the officer, Officer Janssen.

I would find there is evidence here that Doctor Schoeller was operating a motor vehicle, which we saw in the video, on a highway, Brown Deer Road, while under the influence of intoxicants.

There's also her admission of drinking, and the under the influence part, about not being able to safely operate a motor vehicle, certainly is borne out by the physical observations and the field sobriety.

So certainly, you add onto that some consciousness perhaps of guilt, which by doing the refusal, and I think that does add up to an OWI.

The circuit court also found Schoeller guilty of making an illegal U-turn.⁴ This appeal follows.

DISCUSSION

¶11 Schoeller makes the following arguments on appeal: (1) Ehler did not have the requisite level of suspicion to request that Schoeller perform a PBT and, without the PBT test result, Ehler did not have probable cause to arrest Schoeller; and (2) without the refusal to submit to the chemical breath test there

⁴ Schoeller does not appeal the circuit court's finding that Schoeller was guilty of making a U-turn in violation of WIS. STAT. § 346.04(2).

was insufficient evidence to support the circuit court's finding of guilt. We disagree.

I. Ehler had Probable Cause to Request Schoeller Submit to a PBT.

¶12 An officer may request a non-commercial driver to submit to a PBT if there is “probable cause to believe” the driver violated the OWI laws. *See County of Jefferson v. Renz*, 231 Wis. 2d 293, 310, 603 N.W.2d 541 (1999); WIS. STAT. § 343.303. “Probable cause to believe” a driver violated the OWI laws under § 343.303 means “a quantum of proof greater than the reasonable suspicion necessary to justify an investigative stop ... but less than the level of proof required to establish probable cause for arrest.” *See Renz*, 231 Wis. 2d at 316. “Probable cause 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). This is an objective standard. *See State v. Kutz*, 2003 WI App 205, ¶12, 267 Wis. 2d 531, 671 N.W.2d 660.

¶13 We uphold the circuit court’s findings of fact unless they are clearly erroneous. *See Renz*, 231 Wis. 2d at 316. “Whether those facts satisfy the statutory standard of probable cause is a question of law we review *de novo*.” *See id.*

¶14 A refusal hearing is not a forum in which to weigh evidence; the circuit court’s role is limited to ascertaining whether the arresting officer’s account was plausible. *See Nordness*, 128 Wis. 2d at 36. The issues at a refusal hearing

are limited to those in WIS. STAT. § 343.305(9)(a)5. See § 343.305(9)(c).

SECTION 343.305(9)(a)5 states:

a. Whether the officer had probable cause to believe the person was driving or operating a motor vehicle while under the influence of alcohol, a controlled substance or a controlled substance analog or any combination of alcohol, a controlled substance and a controlled substance analog, under the influence of any other drug to a degree which renders the person incapable of safely driving, or under the combined influence of alcohol and any other drug to a degree which renders the person incapable of safely driving, having a restricted controlled substance in his or her blood, or having a prohibited alcohol concentration or, if the person was driving or operating a commercial motor vehicle, an alcohol concentration of 0.04 or more and whether the person was lawfully placed under arrest for violation of s. 346.63(1), (2m) or (5) or a local ordinance in conformity therewith or s. 346.63(2) or (6), 940.09(1) or 940.25.

b. Whether the officer complied with sub. (4).

c. Whether the person refused to permit the test. The person shall not be considered to have refused the test if it is shown by a preponderance of evidence that the refusal was due to a physical inability to submit to the test due to a physical disability or disease unrelated to the use of alcohol, controlled substances, controlled substance analogs or other drugs.

¶15 The circuit court's findings of fact, which Schoeller does not challenge, satisfy the requisite probable cause standard. Schoeller exhibited numerous indicators of intoxication, including:

- Making an illegal U-turn;
- Responding to emergency lights with unusual driving;
- The odor of an intoxicant coming from Schoeller's vehicle;
- Glassy and bloodshot eyes;
- Admitting to drinking before driving;
- Unable to recite the alphabet on two separate attempts;

- Both eyes exhibiting lack of smooth pursuit, distinct and sustained nystagmus at maximum deviation, and nystagmus prior to 45 degrees;
- Taking too many steps in both directions during the walk-and-turn test;
- Failing to make heel-to-toe contact and leaving three to four inches of space between steps during the walk-and-turn test;
- Failing to turn as instructed during the walk-and-turn test;
- Losing balance and stepping off the imaginary line during the walk-and-turn test;
- Failing to count as instructed during the one leg stand test; and
- Losing balance during the one leg stand test;

These indicators, considered together, are more than sufficient to constitute probable cause to request a PBT. Moreover, these indicators, along with Schoeller's refusal to submit to a PBT, constitute probable cause to arrest under the refusal hearing statute.

¶16 Schoeller also appears to be arguing that she was not “lawfully placed under arrest” for violating WIS. STAT. § 346.63(1). At the refusal hearing, however, Schoeller framed her argument as there being a lack of probable cause to request a PBT. To the extent that Schoeller is now arguing that she was not “lawfully placed under arrest,” this argument has been waived because it was not raised in the circuit court. *See State v. Caban*, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997) (“The general rule is that issues not presented to the circuit court will not be considered for the first time on appeal.”). Nevertheless, even on the merits, an argument that Schoeller was not lawfully placed under arrest fails for the same reason that Schoeller's PBT argument fails: the totality of the circumstances demonstrates that Ehler had probable cause to arrest Schoeller for operating a motor vehicle while under the influence of an intoxicant.

¶17 Accordingly, we conclude that Schoeller improperly refused an evidentiary chemical test of her breath.

II. There Was Sufficient Evidence.

¶18 Schoeller argues that without the refusal to submit to the evidentiary chemical breath test there was insufficient evidence to support the circuit court's finding of guilt. We disagree.

¶19 In determining the sufficiency of the evidence, we limit our inquiry to whether the evidence presented could have convinced a trier of fact, acting reasonably, that the appropriate burden of proof was met. *See City of Milwaukee v. Wilson*, 96 Wis. 2d 11, 21, 291 N.W.2d 452 (1980). The burden of proof in the present case is clear, satisfactory, and convincing evidence. *See id.* at 22. We review the facts in the light most favorable to the judgment. *See State v. Forster*, 2003 WI App 29, ¶2, 260 Wis. 2d 149, 659 N.W.2d 144. If more than one inference can be drawn from the evidence, we must accept the inference found by the circuit court as the finder of fact. *See id.* Whether the evidence is sufficient to support a finding of guilt is a question of law that we review *de novo*. *See State v. Booker*, 2006 WI 79, ¶12, 292 Wis. 2d 43, 717 N.W.2d 676.

¶20 Schoeller appears to concede that the OWI judgment must stand if the circuit court's decision that she unlawfully refused to take a chemical test of her breath is affirmed. As discussed above, we find that Ehler had the requisite probable cause to request a PBT and, therefore, Schoeller impermissibly refused to submit to the evidentiary chemical breath test.

¶21 In order to prove that Schoeller operated a motor vehicle while under the influence of an intoxicant in violation of WIS. STAT. § 346.63(1)(a), Bayside

had to prove by clear, satisfactory, and convincing evidence that Schoeller had “consumed a sufficient amount of alcohol to cause [her] to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle. WIS JI-CRIMINAL 2663B.

¶22 Ehler testified at the November 2, 2015 hearing and bench trial. Again, this testimony established that:

- Ehler had 23 years of experience;
- Schoeller made an illegal U-turn;
- Schoeller drove oddly in response to Ehler’s emergency lights;
- Schoeller was unable to recite the alphabet;
- Schoeller exhibited six clues during the HGN test;
- there was an odor of an intoxicant coming from Schoeller’s vehicle;
- Schoeller had glassy and bloodshot eyes;
- Schoeller performed poorly on the field sobriety tests; and
- Schoeller refused to submit to a PBT.

The circuit court referenced these findings as a basis for its decision that Schoeller operated her vehicle while intoxicated, stating: “[a]s to the OWI ... all that information I’ve gone over already, I won’t go over it again.”

¶23 The circuit court specifically referenced Schoeller’s poor performance on the field sobriety tests as evidence that she could not operate her vehicle safely, stating: “and the under the influence part, about not being able to safely operate a motor vehicle, certainly is borne out by the physical observations and the field sobriety.” The circuit court added to all of this evidence “some

consciousness of guilt” from Schoeller’s refusal to submit to a breath test. Schoeller points to the lack of evidence that her speech was impaired or that she had any difficulties balancing when exiting her car for the field sobriety tests. There is no requirement, however, that a driver must show every possible sign of impairment or extreme symptoms to properly conclude that her ability to safely drive is impaired.

¶24 Accordingly, based on our review of the entirety of the evidence in the light most favorable to the judgment, we conclude that there was sufficient evidence to support the finding that Schoeller operated a motor vehicle while under the influence of an intoxicant.

¶25 For all the foregoing reasons, we affirm.

By the Court.—Judgment and order affirmed.

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

