

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 14, 2005

Cornelia G. Clark
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. 2005AP57-FT

Cir. Ct. No. 2003TR926

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN THE MATTER OF THE REFUSAL OF JOSEPH P. HOGAN:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH P. HOGAN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Marquette County:
RICHARD O. WRIGHT, Judge. *Affirmed.*

¶ VERGERONT, J.¹ Joseph Hogan appeals the circuit court order determining that his refusal to submit to chemical testing of his blood was

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

unreasonable and revoking his operating privileges for two years. He contends that he was arrested when the police officer took him to the garage attached to the police station to perform field sobriety tests, and that the officer did not have probable cause to arrest him at that time. We do not decide whether Hogan was arrested at that time because we conclude that, even if he was, the officer had probable cause to arrest. We therefore affirm.

BACKGROUND

¶1 The only witness at the refusal hearing was Marquette County Deputy Sheriff Shane Heisser, who testified as follows. On April 3, 2003, at approximately 10:15 p.m. he was dispatched to a one-vehicle rollover on County Trunk Highway E and Fifth Avenue west of the Township of Westfield. Upon arriving at the scene, he was informed that another vehicle—Hogan’s—was in the ditch nearby. After investigating the rollover, the officer spoke to Hogan. The officer observed that Hogan’s speech was slow and slurred, his eyes were bloodshot and glassy, and he had an unsteady balance. Hogan told the officer that he was the driver of the vehicle in the ditch, he was the only occupant, and he was not injured. As Hogan spoke, the officer noticed a strong odor of alcohol coming from him. When the officer started to ask Hogan more questions, Hogan said he wanted to go back to his vehicle and did not want to talk to the officer anymore. The officer had to grab Hogan and tell him that he (the officer) was conducting an investigation.

¶2 The officer continued to question Hogan. He asked Hogan if he had been drinking that night and Hogan initially said no. Then Hogan told the officer that he had had one mixed drink at the Haystack after the accident, that he “had driven his vehicle in the ditch within the hour” and went to the Haystack for about

fifteen minutes afterwards; the Haystack was about a half mile away. Later in the conversation, Hogan told the officer that he had consumed one drink at the Village Inn prior to the accident.

¶3 The officer wanted Hogan to perform field sobriety tests and, after being asked three times, Hogan agreed. The roads were icy and the officer did not believe he could safely conduct field sobriety tests at the scene of the accident. The officer told Hogan that he would be taking him to the police station to perform the field sobriety tests and told Hogan twice he was not under arrest. Hogan was transported in the squad car to the police station, which was about two miles away. He was not handcuffed. The officer testified that there was not a closer location at which to perform the tests without icy conditions; the parking lot at the Haystack would have been icy and he did not think it was a good idea to conduct the tests inside the tavern.

¶4 At the police station, the officer took Hogan to the garage where the fire trucks and ambulances are stored. Inside, when he had Hogan stand to begin the first field sobriety test, Hogan said he did not want to take them. At that point, the officer advised Hogan that he was under arrest for operating a motor vehicle while intoxicated.

¶5 On cross-examination, the officer acknowledged that there was no evidence that the driver of the rolled-over vehicle had been drinking or that alcohol had caused that driver to go off the road. He also acknowledged that he attributed the two vehicles going off the road within a hundred yards of each other to the icy conditions.

¶6 After Hogan was placed under arrest, he refused to submit to a chemical test of his blood.

DISCUSSION

¶7 All drivers in Wisconsin impliedly consent to one or more tests of their breath, blood, or urine to determine blood alcohol content. WIS. STAT. § 343.305(2). If a driver refuses to provide the requested sample, the law enforcement officer must take the person's license and prepare a notice of intent to revoke. Section 343.305(9)(a). The driver may request a hearing to challenge the proposed revocation. Under § 343.305(9)(a)5, only specified reasons may be raised at a hearing. The only one of those that Hogan raised at his hearing was whether the officer had probable cause to believe that he was driving under the influence of an intoxicant. Section 343.305(9)(a)5.

¶8 In determining whether probable cause exists for an arrest, we must look to the totality of the circumstances to determine whether 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. Babbitt*, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994). Probable cause is neither a technical nor a legalistic concept; rather, it is a "flexible, common-sense measure of the plausibility of particular conclusions about human behavior," *State v. Petrone*, 161 Wis. 2d 530, 547-48, 468 N.W.2d 676 (1991), conclusions that need not be unequivocally correct or even more likely correct than not. *Texas v. Brown*, 460 U.S. 730, 742 (1983). It is enough if they are sufficiently probable that reasonable people—not legal technicians—would be justified in acting on them in the practical affairs of everyday life. *State v. Wisumierski*, 106 Wis. 2d 722, 739, 317 N.W.2d 484 (1982).

¶9 To establish probable cause at a refusal hearing, the State need only present evidence showing the officer's account is plausible. *State v. Wille*, 185 Wis. 2d 673, 681, 518 N.W.2d 325 (Ct. App. 1994). The circuit court does not weigh the evidence for and against probable cause, does not determine the credibility of witnesses, and need not even believe the officer's story. *Id.* Whether the officer's testimony establishes probable cause under this standard is a question of law, which we review de novo. *See Babbitt*, 188 Wis. 2d at 356.

¶10 We conclude the officer had probable cause to believe that Hogan was operating his vehicle while under the influence of an intoxicant at the time the officer transported him to the garage at the police station for field sobriety tests. For this reason, we need not decide whether an arrest occurred at that time, because, even if it did, the arrest was lawful.

¶11 The officer's observation that Hogan had a strong odor of intoxicants establishes a sufficient basis for a reasonable officer to believe that Hogan had been operating his vehicle after consuming alcohol. It is true that Hogan's statement that he went to the Haystack for a drink *after* the accident might explain why the officer smelled alcohol. However, there was other evidence from which a reasonable officer could infer that Hogan had been drinking alcohol before the accident in a sufficient quantity to "render him ... incapable of driving safely." WIS. STAT. § 346.63(1)(a). First, Hogan initially denied having had anything to drink; then he acknowledged one drink after the accident; and later he acknowledged one before the accident. A reasonable inference from this is that Hogan did not want the officer to know how much he had to drink because Hogan was conscious that he had had too much to be able to drive safely. The same inference of a consciousness of guilt can be reasonably drawn from Hogan's desire to go to his vehicle and not answer any more

questions. Second, slow and slurred speech, glassy and bloodshot eyes, and an unsteady balance are indications to a reasonable officer that Hogan had had more to drink than he admitted. Third and most significantly, the slow and slurred speech and unsteady balance provide a reasonable basis for inferring that Hogan had enough to drink to impair his ability to maintain control over his speech and physical movements. This, in turn, would lead a reasonable officer to believe that Hogan's ability to drive safely was impaired.

¶12 Finally, although the icy road might explain why the other car—with no evidence that the driver had been drinking—went off the road, it does not follow that a reasonable officer may not infer from the fact that Hogan's car was in the ditch that Hogan's consumption of alcohol had impaired his ability to drive safely. Although, as noted above, the officer acknowledged on cross-examination that the icy road caused the two vehicles to go “off the road within a hundred yards of each other,” he also testified that “the fact that [Hogan's] vehicle was in the ditch and [his] observations of [Hogan's] demeanor” led him to believe that alcohol was a factor in Hogan's case. Fairly read, the officer's testimony is *not* that the officer believed Hogan's alcohol consumption had no role in his driving into the ditch, but just the opposite. In any event, the standard is an objective one—what a reasonable officer would believe given the facts known to this officer. Although there may be an innocent explanation for Hogan's car going off the road—the icy conditions—an officer is not required to draw a reasonable inference that favors innocence when there is also a reasonable inference that favors probable cause. *See State ex rel. McCaffrey v. Shanks*, 124 Wis. 2d 216, 236, 369 N.W.2d 743 (Ct. App. 1985). We are satisfied that a reasonable officer could consider Hogan's driving off the road—even given the icy conditions—as an indication that his ability to drive safely was impaired by alcohol. That

reasonable inference and the evidence of Hogan's strong odor of intoxicants, appearance, demeanor, and consciousness of guilt were a sufficient basis for probable cause to believe Hogan was driving while intoxicated.

By the Court.—Order affirmed.

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

