

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 27, 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. 2004AP1501
STATE OF WISCONSIN**

Cir. Ct. No. 2004TR1788

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVEN T. MOORE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Walworth County:
JOHN R. RACE, Judge. *Affirmed.*

¶1 ANDERSON, P.J.¹ Steven T. Moore appeals from an order determining that he unlawfully refused to submit to a chemical test in violation of

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

WIS. STAT. § 343.305. At the refusal hearing, the State presented plausible evidence that the arresting officer had probable cause to believe that Moore was driving while intoxicated. We affirm.

FACTS

¶2 On the evening of March 20, 2004, Deputy Michael Lambert of the Walworth County Sheriff's Department was traveling eastbound on Highway 50 when he observed a vehicle traveling in the westbound lanes at a high rate of speed. Lambert's radar indicated that the vehicle was traveling at least seventy-five miles per hour in a posted fifty-five mile per hour zone. Lambert did not notice any other unusual driving other than the speeding. Lambert proceeded to conduct a traffic stop of the speeding vehicle.

¶3 Upon stopping the vehicle, Lambert approached the driver, whom he identified as Moore. Lambert also observed a passenger in the vehicle. Lambert detected the odor of intoxicants coming from the vehicle. While speaking with Moore, Lambert further observed an odor of intoxicants on Moore's breath, Moore's speech was slurred and his eyes were slightly glassy. Moore informed Lambert that he had not been drinking at all that day.

¶4 Lambert asked Moore to exit the vehicle to perform field sobriety tests. As he was exiting the vehicle, Lambert observed Moore grab onto the driver's door in order to balance himself as he got out. He further observed Moore stumble as he walked along the edge of the vehicle. Lambert attempted to conduct a Horizontal Gaze Nystagmus (HGN) test. Lambert was unable to complete the test because Moore continually moved his head back and forth despite Lambert's instructions to keep his head still and his chin down. While Moore was attempting

to perform this test, he was facing into an estimated thirty mile per hour wind. Moore then informed Lambert that he recently had a cast removed from his ankle.

¶5 At this time, Lambert asked Moore to submit to a preliminary breath test. Lambert explained to Moore how to blow into the tube, “I told him to blow clearly through the tube, as if he was blowing up a balloon, and to blow as hard as possible and I would tell him to stop.” Moore weakly blew into the tube, covering the tube with his tongue or teeth. The preliminary breath test registered a reading of .01 percent.

¶6 Lambert determined that Moore was under the influence of an intoxicant and placed him under arrest. Moore was transported to the Walworth County Jail, where he was read the Informing the Accused form. Moore refused to provide a legal breath sample.

¶7 The trial court conducted a refusal hearing on June 1, 2004. Lambert testified to the above events at the hearing. At the conclusion of the hearing, Moore argued that Lambert did not have probable cause to arrest Moore, especially given the preliminary breath test reading of .01 percent. The trial court rejected Moore’s argument and concluded that Moore had refused to submit to a chemical test without proper justification. Moore appeals from the refusal order holding him in violation of WIS. STAT. § 343.305 and revoking his driving privileges for one year.

STANDARD OF REVIEW

¶8 We will uphold a trial court’s findings of fact if the findings are not clearly erroneous. *State v. Roberts*, 196 Wis. 2d 445, 452, 538 N.W.2d 825 (Ct. App. 1995). Whether a set of facts constitutes probable cause is a question of law

that we review de novo. *State v. Babbitt*, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994).

DISCUSSION

¶9 The sole issue before us on appeal is whether the trial court properly determined that Moore refused to submit to a breath test in violation of WIS. STAT. § 343.305. Moore asserts that the arresting officer lacked probable cause to believe that he was driving while intoxicated when the officer placed him under arrest. We begin our analysis of Moore's appeal with a discussion of § 343.305(9), the statutory subsection that outlines the procedure to be followed at a refusal hearing, and then we will apply the subsection's guiding principles to Moore's claim.

WIS. STAT. § 343.305(9) Refusal Hearing

¶10 *State v. Nordness*, 128 Wis. 2d 15, 381 N.W.2d 300 (1986), is instructive on (1) the issues within a refusal hearing and (2) the State's burden at the refusal hearing. *Nordness* teaches that the refusal hearing is strictly limited to the issues found in WIS. STAT. § 343.305(9)(a)5.a through c. *See Nordness*, 128 Wis. 2d at 25-26. Those issues are limited to:

- a. Whether the officer had probable cause to believe the person was driving or operating a motor vehicle while under the influence of alcohol ... 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 [the informational requirements of] 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.

Sec. 343.305(9)(a)5.

¶11 *Nordness* also plainly instructs that the State has a very low threshold to clear to establish the probable cause element of the refusal hearing.

We deem the evidentiary scope of a revocation hearing to be narrow. In terms of the probable cause issue, the trial court in a revocation hearing is statutorily required merely to determine that probable cause existed for the officer's belief of driving while intoxicated.

We view the revocation hearing as a determination merely of an officer's probable cause, not as a forum to weigh the state's and the defendant's evidence. Because the implied consent statute limits the revocation hearing to a determination of probable cause—as opposed to a determination of probable cause to a reasonable certainty—we do not allow the trial court to weigh the evidence between the parties. The trial court, in terms of the probable cause inquiry, simply must ascertain the plausibility of a police officer's account.

Nordness, 128 Wis. 2d at 35-36 (citation omitted).

¶12 From *Nordness*, we extract two principles that we will follow when deciding Moore's challenge to the trial court's findings. First, the trial court is not to weigh the competing evidence when determining probable cause. *Id.* at 36. Second, the trial court need not believe the officer's account of the events, so long as the State has proven that the officer's account is plausible. *Id.*; *State v. Wille*, 185 Wis. 2d 673, 681, 518 N.W.2d 325 (Ct. App. 1994). These principles are self-evident because the implied consent statute limits the refusal hearing, a civil proceeding, to a determination of probable cause, rather than a determination of probable cause to a reasonable certainty. *See Nordness*, 128 Wis. 2d at 36.

Application of Wis. STAT. § 343.305(9)

¶13 Lambert smelled an odor of intoxicants coming from the vehicle. Although Moore claimed he had not been drinking, Lambert detected an odor of intoxicants on Moore's breath, observed him slur his words and noticed that Moore had glassy eyes. Lambert saw that Moore's balance was unsteady and that he stumbled when he walked. Moore also would not cooperate with the field sobriety test or the preliminary breath test Lambert attempted to conduct. Based on these observations as well as his own personal and professional experience with individuals who have consumed alcohol, Lambert came to the conclusion that Moore was intoxicated at the time.²

¶14 Moore submits that Lambert lacked probable cause to arrest primarily because (1) the weather conditions at the time of the stop and his apparently weak ankle could have inhibited his abilities to exit his vehicle and properly perform the field sobriety tests; (2) other than speeding, Lambert did not observe Moore driving erratically; and (3) the preliminary breath test administered at the scene indicated a blood alcohol content of .01 percent. Moore argues that these facts present total circumstances insufficient to support a finding of probable cause.

¶15 The facts that it was windy when Lambert asked Moore to perform the tests and that Moore's ankle may have contributed to his unsteadiness do not negate Lambert's other observations. Moore's odoriferous breath, glassy-eyed

² In determining whether probable cause exists, the trial court may consider the officer's previous experience, *State v. DeSmidt*, 155 Wis. 2d 119, 134-35, 454 N.W.2d 780 (1990), and also the inferences that the officer draws from that experience and the surrounding circumstances, *see State v. Pozo*, 198 Wis. 2d 705, 713, 544 N.W.2d 228 (Ct. App. 1995).

appearance, slurred speech and uncooperativeness³ sufficiently support Lambert's determination that Moore was probably intoxicated. Also, Lambert was not required to rule out innocent explanations for apparent indicia of intoxication. *See State v. Colstad*, 2003 WI App 25, ¶8, 260 Wis. 2d 406, 659 N.W.2d 394, *review denied*, 260 Wis. 2d 752, 661 N.W.2d 100 (Wis. Apr. 22, 2003) (No. 2001AP2988-CR), *cert. denied*, 540 U.S. 877 (U.S. Wis. Oct. 6, 2003) (No. 03-110).

¶16 Further, improper driving is not an element of an OWI offense. *State v. Powers*, 2004 WI App 143, ¶12 n.2, 275 Wis. 2d 456, 685 N.W.2d 869. Therefore, proof of erratic driving is not required for purposes of determining probable cause to arrest.

¶17 Finally, while the preliminary breath test suggested sobriety, the test is not the sole determinant of probable cause to arrest. *County of Dane v. Sharpee*, 154 Wis. 2d 515, 520, 453 N.W.2d 508 (Ct. App. 1990). Its results may be outweighed by other indicia of intoxication. *See id.* Such is the case here.

¶18 As explained, the State, at a refusal hearing, has a very low threshold to clear to establish that the arresting officer had probable cause for his or her belief of driving while intoxicated. The standard is mere plausibility. After reviewing Lambert's testimony, we, like the trial court, conclude that Lambert's account of his encounter with Moore is plausible and demonstrates that a reasonable officer, when considering all the circumstances of the encounter, would

³ A defendant's refusal to properly perform field sobriety tests may be used as evidence of probable cause. *See State v. Babbitt*, 188 Wis. 2d 349, 359-60, 525 N.W.2d 102 (Ct. App. 1994).

believe that Moore was driving while under the influence of an intoxicant. Therefore, we hold the State carried its burden of establishing probable cause for the arrest and affirm the order revoking Moore's driving privileges as a result of his refusal to submit to a breath test.

By the Court.—Order affirmed.

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

