

**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. 2005AP56  
STATE OF WISCONSIN**

Cir. Ct. No. 2004TR6059

**IN COURT OF APPEALS  
DISTRICT II**

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**IN THE MATTER OF THE REFUSAL OF CATHERINE M. PARRILLI:**

**STATE OF WISCONSIN,**

**PLAINTIFF-APPELLANT,**

**v.**

**CATHERINE M. PARRILLI,**

**DEFENDANT-RESPONDENT.**

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

¶1 SNYDER, J.<sup>1</sup> The State appeals from an order holding that Catherine M. Parrilli's refusal to submit to an evidentiary chemical test of her blood was reasonable. The State contends that the circuit court erred when it ruled that there was insufficient probable cause for the police officer to arrest Parrilli for operating a motor vehicle while under the influence of an intoxicant. The State argues that whether Parrilli was the actual driver of the vehicle is not an issue to be determined at a refusal hearing. We agree and reverse the order of the circuit court.

¶2 The facts are brief and undisputed. At approximately 1:20 a.m. on October 1, 2004, Daniel Nelson, a deputy with the Walworth County Sheriff's Department, observed a vehicle sitting on the shoulder of Highway 50 in the Township of Geneva. Nelson parked behind the vehicle and activated his emergency lights. He walked to the passenger side of the vehicle and observed a woman lying across the seat of the car, with her head on the passenger side of the front seat and her feet near the driver's side. Nelson later identified the woman as Parrilli.

¶3 Nelson noticed that the engine was off and the keys were in the ignition. He tried to wake Parrilli by first knocking on the window and then pounding on the door, announcing himself as a Walworth county deputy. Approximately one minute later, she started to move. Nelson walked to the driver's side door and saw Parrilli was now sitting up with her hands on the steering wheel. He again began knocking to get her attention and eventually

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<sup>1</sup> 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.

Parrilli noticed Nelson standing by the car window. At this point, she moved her hands in a rotating motion on the wheel as if she were pulling over to the side of the road and stated, "I'm pulling over." She reached for the shift lever, then the keys, and finally rested her hands back on the steering wheel and sat still.

¶4 Nelson opened the door to the car and asked if Parrilli had her driver's license. As Parrilli handed Nelson her license, Nelson noticed that Parrilli's eyes were bloodshot and he subsequently detected a strong odor of alcohol when Parrilli started to talk. Nelson asked Parrilli where she had been, and she responded that she had had a couple of drinks in Whitewater and was going home. Nelson then asked Parrilli to perform field sobriety tests, which she failed.

¶5 Nelson informed Parrilli that he was placing her under arrest for operating while intoxicated and asked her to submit to a preliminary breath test. Parrilli refused. Nelson then took Parrilli to Lakeland Medical Center, where he read her the Informing the Accused form. After reading the form, Nelson gave it to Parrilli for her to read as well. He then asked Parrilli if she would submit to an evidentiary blood test. She refused the test; Nelson gave her a Notice of Intent to Revoke Operating Privilege based on her refusal.

¶6 Parrilli requested a refusal hearing. At the hearing, the circuit court determined that Parrilli's refusal to submit to the evidentiary blood test was reasonable. It based its decision largely on Nelson's testimony that he did not see Parrilli drive the car, he did not ask her if she had been driving, nor did he check the car's hood to see if it was warm. The court ruled that the State did not present sufficient evidence to make a finding of probable cause that Parrilli drove or operated the car.

¶7 The issues to be addressed at Parrilli's refusal hearing were: (1) whether Nelson had probable cause to believe Parrilli was driving or operating a motor vehicle while under the influence of alcohol to a degree which renders the person incapable of safely driving, (2) whether Nelson read the required information to the accused, (3) whether Parrilli refused to permit the test and, if so, (4) whether Parrilli's refusal was due to a physical inability to submit to the test. *See* WIS. STAT. § 343.305(9)(a)5. Only the issue of probable cause is in dispute.

¶8 Where the underlying facts are undisputed, the issue of whether an officer had probable cause to arrest is a question of law, which we review de novo. *See State v. Williams*, 104 Wis. 2d 15, 21-22, 310 N.W.2d 601 (1981). The issue at a refusal hearing is not whether the evidence establishes that a defendant was actually operating a motor vehicle while intoxicated, but whether the evidence demonstrates that the officer had probable cause to believe that the defendant was operating a motor vehicle while intoxicated. *State v. Nordness*, 128 Wis. 2d 15, 28, 381 N.W.2d 300 (1986).

¶9 Parrilli argues that the circuit court made a finding of fact, specifically, "the officer failed to touch the very basic question of 'did you drive?' or ascertain the vehicle had, in fact, been driven by feeling the hood of the vehicle." This finding, Parrilli asserts, supports the circuit court's determination that Nelson did not have probable cause to arrest her. Parrilli fails to recognize, however, that the evidentiary scope of a refusal hearing is narrow. *See id.* at 35. It is not a forum for the circuit court to weigh the evidence between the parties. *Id.* at 36. The circuit court's determination that the police officer could have done more to establish that Parrilli was the actual driver of the vehicle is not relevant to

the determination of probable cause at a refusal hearing.<sup>2</sup> “It is not necessary to find that the defendant was the actual driver in order to find that the police officer had probable cause to believe [the defendant] was driving while under the influence of alcohol.... [T]he determination of whether a defendant was the actual driver is not an issue, nor is it material to the inquiry of whether probable cause existed.” *Id.* at 28-29.

¶10 The State’s burden at the refusal hearing is only to prove that the information available at the scene would lead a reasonable officer to believe that the individual’s guilt is more than a possibility. *See Browne v. State*, 24 Wis. 2d 491, 503-04, 129 N.W.2d 175 (1964), *cert denied*, 379 U.S. 1004 (1965). “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.” *Nordness*, 128 Wis. 2d at 35.

¶11 For purposes of this appeal, Parrilli does not deny that she was intoxicated at the time of the arrest. She does not dispute that she was alone in the vehicle when Nelson arrived. Parrilli admitted that she was drinking in Whitewater prior to Nelson’s arrival and that she was on her way home. Her vehicle was on the shoulder of Highway 50 at the time Nelson arrived. The keys were in the ignition, although the engine was not running. Upon rousing from her sleep, Parrilli sat upright in the driver’s seat, put her hands on the wheel, stated “I’m pulling over,” and then reached for the shift lever and the keys in the

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<sup>2</sup> At the conclusion of the refusal hearing, the circuit court stated: “I wish the officer had asked that question that [the defendant] wants, did you drive here. Obviously, if she did, the question then is put your hand on the radiator and find out how long ago it was.”

ignition. Nelson observed all of this. That Parrilli drove the car while intoxicated on the night of her arrest is both reasonable and plausible, given the totality of the circumstances known to Nelson at the time. We conclude that Nelson had sufficient probable cause to request that Parrilli submit to a chemical blood test.

*By the Court.*—Order reversed.

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

