

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 6, 2018

Diane M. Fremgen
Acting 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. 2017AP888

Cir. Ct. No. 2016TR10066

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN THE MATTER OF THE REFUSAL OF DUSTIN R. WILLETTE:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DUSTIN R. WILLETTE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Brown County:
THOMAS J. WALSH, Judge. *Affirmed.*

¶1 SEIDL, J.¹ Dustin Willette appeals an order revoking his vehicle operating privilege based on his refusal to submit to chemical testing of his blood,

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

contrary to WIS. STAT. § 343.305(9)(a). Willette raises two issues on appeal: (1) whether the arresting officer lacked probable cause to believe Willette was operating a motor vehicle while intoxicated (OWI); and (2) whether Willette improperly refused an officer's request for a chemical test of his blood. The circuit court answered both questions against Willette. We affirm.

BACKGROUND

¶2 A notice of intent to revoke Willette's operating privilege was filed after Willette was arrested for OWI and refused a chemical test. Willette made a timely request for a refusal hearing.

¶3 Officer Alexis Hughes, who was the sole witness at the refusal hearing, testified she received a police dispatch to a gas station on Packerland Drive at 5:24 a.m. The dispatch informed Hughes that a caller recently saw a vehicle stop in the gas station parking lot and that a white male wearing a blue suit with a pink shirt and black shoes had exited the vehicle. When Hughes arrived at the gas station, she saw tire tracks going through the parking lot, adjacent mud tracks leading to a damaged plastic tube affixed to the ground, and to an unoccupied vehicle that was not running. It appeared to Hughes that the vehicle had run over the plastic tube.

¶4 While still at the gas station, Hughes received information that another officer located a man walking on Packerland Drive who matched the caller's description of the driver. Hughes proceeded to that location and made contact with the man, who identified himself as Willette. Hughes observed that

Willette matched the description of the man reported by the caller.² When questioned by Hughes, Willette stated he had been drinking at a wedding and that he did not know where he was at that moment.

¶5 With Willette’s permission, Hughes transported Willette back to the location of the vehicle at the gas station. There, Willette told Hughes that he drove a similar vehicle, but he did not identify the particular vehicle at the scene as belonging to him. At no time did Willette tell Hughes the vehicle at the gas station was not his. Hughes told Willette that a surveillance camera showed him exiting the vehicle at the gas station. Hughes testified that she had not reviewed the video before making this statement to Willette at the scene. Hughes then had Willette perform three standardized field sobriety tests. She observed that Willette exhibited six clues of intoxication on a horizontal gaze nystagmus test, as well as two such clues each on a walk-and-turn test and a one-leg-stand test. Willette then refused to take a preliminary breath test. Relying on her training and experience, Hughes arrested Willette for OWI.

¶6 Hughes testified she read the Informing the Accused form, *see* WIS. STAT. § 343.305(4), to Willette and requested that he submit to a blood test. Hughes testified Willette failed to answer either “yes” or “no” to that request, so she determined he refused the blood test.

¶7 Willette offered into evidence the gas station surveillance video and the recording from Hughes’ body camera showing the encounter with Willette, the

² In the circuit court, Willette did not claim Hughes lacked reasonable suspicion for any investigatory stop. To whatever extent he now attempts to raise such issue on appeal, the issue is forfeited, and we decline to address it. *See State v. Bodoh*, 226 Wis. 2d 718, 737, 595 N.W.2d 330 (1999).

field sobriety tests, and the reading of the Informing the Accused form. At the conclusion of evidence, Willette argued that: (1) Hughes lacked “the required cause” to arrest Willette; (2) Hughes lacked “proof” that Willette was the driver of the vehicle at the gas station; and (3) Willette never provided a “clear refusal” to submit to the blood test.

¶8 The circuit court rejected Willette’s arguments. First, the court relied upon Hughes’ testimony in finding that Willette matched the description of the man reported by the caller to dispatch as the man who drove the vehicle into the gas station parking area. The court declined to rely upon the surveillance camera video of the gas station parking lot in its findings because Hughes had not reviewed the video before arresting Willette. Second, the court concluded Hughes properly administered the field sobriety tests and observed sufficient signs of impairment during the tests. Taking all the evidence into consideration, the court concluded Willette was the vehicle operator and that Hughes had sufficient probable cause to arrest Willette for OWI.

¶9 On the refusal issue, the circuit court made the following factual findings after it reviewed the portion of the body camera video of Hughes reading Willette the Informing the Accused form:

[T]he instructions were read appropriately, as required by statute, by this officer. [Willette] answered, I don’t know what the right answer is, to which the officer said, Would you like me to read it again? And he answered yes ... to which the officer then read the instructions again.

At that point [Willette] asked if he could call a lawyer. The officer instructed him that he needed to answer yes or no. Then he indicated he wanted to talk to a legal person. At that point I believe the officer determined that she was going to view it as a refusal. She said, Okay. And it’s clear she started to walk away. And you can hear [Willette] engaging further saying, I don’t know what the right

answer is. He said that two times after the officer said, Okay.

The court noted that Willette did not claim he was “confused” by the form, and it concluded his acts “to continue to engage” with Hughes constituted a refusal.

¶10 The circuit court entered an order revoking Willette’s operating privilege for one year, pursuant to WIS. STAT. § 343.305(10)(b)2. That penalty was stayed pending this appeal.

DISCUSSION

¶11 At a refusal hearing, a defendant may challenge only: (1) whether the police officer had probable cause to believe the accused drove a vehicle under the influence of an intoxicant and was lawfully arrested for an OWI offense; (2) whether the officer properly informed the defendant under the implied consent statute, *see* WIS. STAT. § 343.305(4); and (3) whether the defendant improperly refused a chemical test. WIS. STAT. § 343.305(9)(a)5.a.-c. We uphold a circuit court’s findings of fact unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2). The application of the implied consent statute to findings of fact is a legal question that we review de novo. *State v. Piddington*, 2001 WI 24, ¶13, 241 Wis. 2d 754, 623 N.W.2d 528.

¶12 On appeal, Willette argues that Hughes lacked probable cause that he had committed an OWI necessary for Hughes to request a blood draw. Probable cause exists where, under the totality of the facts and circumstances known to the officer at the time of arrest, a reasonable person would believe an unlawful offense has been committed. *County of Dane v. Sharpee*, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990). In the context of a refusal hearing, a court need only “ascertain the plausibility” of a law enforcement officer’s account

when considering whether he or she had probable cause to believe a person committed OWI. *See State v. Nordness*, 128 Wis. 2d 15, 36, 381 N.W.2d 300 (1986).

¶13 Initially, Willette asserts that several of the circuit court’s factual findings regarding the probable cause issue were clearly erroneous. He first argues “[t]he record is entirely devoid of a single fact that indicates [he] was the driver” of the vehicle prior to Hughes relocating him to the vehicle at the gas station. Willette notes that the circuit court stated it did not observe “any demonstrated video of the defendant leaving the car” when it viewed the surveillance camera recording of the parking lot. That argument ignores Hughes’ testimony that the dispatch report informed her that a caller saw a man wearing a blue suit and a pink shirt with black shoes exit the vehicle, and that Willette matched this description. Willette’s argument also ignores his admission to Hughes that he drove a vehicle similar to the one at the gas station. To the extent Willette contests Hughes’ testimony in this regard, the credibility of the witnesses and the weight of the evidence are issues left to the circuit court. *State v. Baudhuin*, 141 Wis. 2d 642, 647, 416 N.W.2d 60 (1987). The circuit court was entitled to rely upon Hughes’ testimony in its findings. *See* WIS. STAT. § 805.17(2).

¶14 Moreover, the circuit court’s decision not to rely upon the surveillance camera recording does not render its findings clearly erroneous. The court explained it did not consider the footage in its findings and conclusions

because Hughes testified she did not review it before arresting Willette.³ Willette cites no legal authority supporting his positions that Hughes had to view the surveillance footage prior to arresting Willette and that, if Hughes did not view the video, the court could not rely upon her testimony in its findings of fact. Indeed, a refusal hearing is “not ... a forum to weigh the state’s and the defendant’s evidence,” *Nordness*, 128 Wis. 2d at 36, and only the facts and circumstances available to the officer at the time of an arrest are relevant to determining probable cause, *id.* at 37 n.6.

¶15 Willette next contends the circuit court erred in finding that Hughes correctly administered the field sobriety tests and how Willette performed on the tests. However, the circuit court resolved any factual disputes when—after reviewing the body camera video—it found that Hughes’ testimony on the clues she observed was credible, that she correctly administered the field sobriety tests, and that she properly instructed Willette how to perform them. *See State v. Walli*, 2011 WI App 86, ¶17, 334 Wis. 2d 402, 799 N.W.2d 898 (clearly erroneous standard applies to a circuit court’s factual findings based upon a video). This court has reviewed the video recording, and we reject Willette’s contention that it refutes the circuit court’s findings of fact. *See* WIS. STAT. § 805.17(2). In all, we conclude the circuit court’s findings of fact were not clearly erroneous.

¶16 Having addressed Willette’s factual challenges, we also conclude that Hughes’ observations satisfied the probable cause standard. Hughes

³ The circuit court also noted that the surveillance camera recording was of poor quality, such that the court could only see “movement in and out of the shade” when attempting to observe the driver exiting the vehicle. Our review of the recording confirms that this observation is not clearly erroneous.

reasonably concluded the vehicle at the gas station ran over the plastic pipe in the early hours of the morning. She had reason to suspect Willette was the driver of the vehicle when she encountered him because his description matched that of the dispatch report. Willette admitted to Hughes he had been drinking at a wedding that night, which, according to the circuit court, was “to such a point that he had no idea where he was.” After Hughes brought him back to the gas station, Willette admitted he drove a similar vehicle on that night. Hughes then observed a number of clues on all three field sobriety tests that Willette performed. The court properly concluded the totality of the circumstances provided Hughes with probable cause to believe Willette drove the vehicle at issue while intoxicated. *See County of Dane*, 154 Wis. 2d at 518.

¶17 Finally, Willette argues that he did not refuse a blood test after Hughes read him the Informing the Accused form. He emphasizes that he never said “yes” or “no” to Hughes. Instead, Willette contends that Hughes prematurely marked him as refusing the test because he only wanted to engage in further discussion about the legal consequences before making his choice.

¶18 Willette’s argument lacks merit. “The implied consent law does not require a verbal refusal[,]” and an arrestee may instead refuse a test through conduct that prevents an officer from obtaining a chemical sample.⁴ *State v. Reitter*, 227 Wis. 2d 213, 234, 595 N.W.2d 646 (1999) (citation omitted). After

⁴ Willette incorrectly conflates withdrawal of consent to search as an exception to the Fourth Amendment—which is not at all implicated in this case—with a refusal of a chemical test under WIS. STAT. § 343.305(9)(a). While Willette cites several cases holding that withdrawal of consent to search must be based on an unequivocal statement or act, *see, e.g., State v. Wantland*, 2014 WI 58, ¶33, 355 Wis. 2d 135, 848 N.W.2d 810, he cites no authority in which that same principle has been applied to a refusal to take a blood test.

being requested to answer an officer's reading of the Informing the Accused form, an arrestee may even tell the officer he or she is "not refusing" but nevertheless be deemed to have refused the test by not providing a "yes" or "no" answer. *See id.* at 237. Furthermore, "[b]ecause the implied consent law makes no provision for the right to counsel, an officer is correct to record a refusal if the arrestee insists on speaking to an attorney before answering." *State v. Kliss*, 2007 WI App 13, ¶7, 298 Wis. 2d 275, 728 N.W.2d 9 (2006); *see also Reitter*, 227 Wis. 2d at 225, 235.

¶19 Even though Willette never said "no" to Hughes, we conclude his conduct rose to the level of a refusal under the above principles. The circuit court found Willette was not "confused" by either of two accurate readings of the implied consent form. He responded that he wanted to talk to a "legal person" or lawyer after Hughes told him to answer yes or no. Willette misses the point when he emphasizes that his statements indicate he was "attempting to seek clarification" on the right answer. As the circuit court aptly observed, "there is no right answer to whether to take these tests or not. The answer is either yes or no." Quite simply, Hughes correctly determined Willette refused a blood test when he conditioned his answer on talking to a lawyer. *See Kliss*, 298 Wis. 2d 275, ¶7.

By the Court.—Order affirmed.

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

