

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 18, 2018

Sheila T. Reiff
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. 2017AP1886-CR

Cir. Ct. No. 2016CT1508

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JACQUELINE M. DATKA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County:
LEE S. DREYFUS, JR., Judge. *Affirmed.*

¶1 NEUBAUER, C.J.¹ Jacqueline M. Datka appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OWI)

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

with a passenger under sixteen years of age and challenges the denial of her motion to suppress. She asserts that the officer's request for a preliminary breath test (PBT) was not supported by the requisite probable cause. Because an eyewitness report, observations by officers, and indicators from field sobriety tests supported the request, we affirm.

BACKGROUND

¶2 On October 19, 2016, Waukesha County Sheriff Deputy Kyle Steger received a call regarding a reckless driver in the Village of Sussex.² The caller complained that the vehicle was squealing its tires, having trouble maintaining its lanes, and varying its speeds. Based on the vehicle's description and its license plate, Steger located the vehicle parked between two parking spaces at a restaurant.

¶3 As Steger entered the parking lot, the vehicle began to back out. Steger parked behind the vehicle and then approached the driver's side. The driver, who was Datka, spoke slowly, had glossy eyes, and moved very slowly when retrieving her identification. Although Steger did not detect an odor of alcohol, he began to believe Datka was impaired by something.

¶4 Shortly thereafter, Waukesha County Sheriff Deputy Daniel Coats arrived and met with Steger. Steger informed Coats about Datka's slow speech and movement, the lack of an intoxicant odor, and that he was unsure what the problem was, but believed she was impaired, perhaps by medication.

² The facts are taken from the motion hearing testimony of the two officers involved. The parties do not dispute the material facts.

¶5 Coats met with J.C., the reporting witness. J.C. said Datka's vehicle almost struck her. She then watched Datka briefly drive through a grassy area while leaving a parking lot. J.C. followed, observing "numerous traffic infractions" and "extremely erratic" driving: Datka would stop well before stop signs, then quickly accelerate through the intersection; she screeched her tires numerous times and she would cross the center line; and Datka almost struck a parked vehicle.

¶6 Upon making contact with Datka, Coats observed her shirt was wet and she spoke slowly, but without slurring. Datka labored to get out of her vehicle, using the door for balance. As she went to the back of the vehicle as instructed, she had some difficulty walking.

¶7 Coats questioned Datka about her driving, and Datka eventually admitted to drinking one twenty-four ounce alcoholic beverage. When face-to-face, Coats detected a light odor of intoxicants. He asked Datka if she would take standardized field sobriety tests, and she agreed to do so.

¶8 Coats conducted the horizontal gaze nystagmus (HGN) test, which he considers the most accurate of the tests. During the test, Datka had difficulty following directions, moving her head, instead of just her eyes, along with Coats' finger. Coats reminded her three times to keep her head still, making it difficult to complete the test. Exhibiting four of the six possible clues indicates the person has an illegal blood alcohol content (BAC) for driving. Datka exhibited two clues.

¶9 Coats administered the walk-and-turn test. He set Datka in the instructional position, advising her not to move while he explained the test. Datka immediately began walking, however. After resetting her, Coats noticed Datka's difficulty standing. Once the test began, Datka walked normally rather than heel-

to-toe, raised her arms for balance, and traced an L-shaped pattern rather than turning around and walking back.

¶10 Coats then conducted the one-leg-stand test, asking Datka to hold her foot off the ground for thirty seconds. Datka stepped down once at fourteen seconds and only reached nineteen seconds in total before time expired. Out of the test's four clues, two indicated an illegal BAC. Datka exhibited one.

¶11 Coats asked her to count down from sixty-two to forty-seven. Instead of stopping, Datka counted down to zero.

¶12 Next, Datka performed the alphabet test. There were no issues.

¶13 Finally, Coats conducted the Romberg test, where the person stands with feet together, arms at the side, eyes closed, and head tilted back. The person must estimate the passage of thirty seconds. After seventeen seconds, Datka said she was done. Coats watched for balancing difficulty, but noted none.

¶14 Coats formed the opinion that Datka was impaired by an intoxicant. She was asked to take a PBT, the results of which were 0.193.

¶15 Datka moved to suppress the results, arguing there was no probable cause to request a PBT. After the circuit court denied the motion, Datka pled guilty to OWI (first offense) with a minor passenger. She now appeals.

DISCUSSION

Standard of Review for Probable Cause

¶16 We review a circuit court's probable cause determination in two parts: we uphold findings of fact unless they are clearly erroneous, and we review

whether those facts constitute probable cause de novo. *State v. Felton*, 2012 WI App 114, ¶8, 344 Wis. 2d 483, 824 N.W.2d 871.

¶17 Before requesting a PBT, an officer must have “probable cause to believe” that the motorist operated the vehicle under the influence of an intoxicant. WIS. STAT. § 343.303. This standard is not as high as the probable cause standard needed for an arrest. *County of Jefferson v. Renz*, 231 Wis. 2d 293, 295, 315-16, 603 N.W.2d 541 (1999). The “probable cause to believe” needed to request a breath test is that “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.” *Id.* at 316. We assess case by case whether this standard has been met, considering the totality of the circumstances. *Felton*, 344 Wis. 2d 483, ¶9.

Coats Had Probable Cause to Request a PBT

¶18 Datka argues there was no probable cause before the breath test to believe she drove drunk. She points out the following: Steger told Coats he had not observed any “immediate signs of intoxication”;³ neither officer detected an odor of intoxicants initially, and Coats later noticed only a “light” odor; Coats stated that, while slow, Datka’s speech was not slurred; Datka passed the HGN test (considered the most accurate), the one-leg-stand test, and the alphabet test;⁴ though she did not walk as demonstrated by Coats for the walk-and-turn test, she

³ At the motion hearing, Steger agreed that he told Coats that he saw “no immediate signs of intoxication,” but later explained that he meant that he had not detected “an immediate sign of alcohol emitting from the vehicle.”

⁴ Datka acknowledges she exhibited some clues on the HGN and one-leg-stand tests, but not enough to indicate, per Coats’ testimony, she was under the influence.

did take the proper number of steps (nine steps each way); she performed well on the countdown test, but for the minor error of counting down to zero; and she showed no balance problems on the Romberg test. Finally, Datka notes that the stop did not occur near bar time, but in the afternoon. *See State v. Lange*, 2009 WI 49, ¶32, 317 Wis. 2d 383, 766 N.W.2d 551 (time of day/night is a consideration, as drinking and driving occurs more often around bar time).

¶19 While Datka appropriately highlights the circumstances in her favor, she fails to address, much less refute the impact of, the totality of circumstances upon which Coats relied to make the request. Datka overlooks, most significantly, the eyewitness report of J.C. J.C. saw driving behavior that can fairly be described as reckless and dangerous. Datka almost struck J.C., stopped well short of stop signs and then rapidly screeched through them, failed to maintain her lane, and nearly struck a second car. Noteworthy are the facts that J.C. described the vehicle and license plate—ensuring that the officers stopped the correct vehicle—and not only gave her name, but also met and spoke with Coats—making her observations far more reliable than an anonymous tip. More striking still is that, as reported by J.C., the perilous nature of Datka’s driving was of several kinds: near collisions with other vehicles, misjudging of stopping distances, gratuitous and rapid accelerations, and an inability or indifference to drive or park within marked lines.

¶20 When the evidence of Datka’s dangerous driving was subsequently corroborated and strengthened by her halting demeanor, admitted drinking, and spotty, at best, performance on the sobriety tests, probable cause plainly existed to believe that Datka had driven under the influence. We focus on the following: Datka parked her vehicle straddling two spaces; her glossy eyes, slow speech, and sluggish movement caused Steger to believe that she was under the influence of

something; in addition to her slow speech and difficulty moving, Coats noted her wet shirt and admission to drinking; of six sobriety tests, Datka succeeded fully on only the alphabet test; to varying degrees, she stumbled during the other five, exhibiting two clues on the HGN test, failing to follow simple instructions on the walk-and-turn and countdown tests, falling markedly short of holding her one-leg stance, and misjudging the length of thirty seconds by almost half (which Coats considered “pretty extreme”).

¶21 Datka relies on only one case, *State v. Begicevic*, 2004 WI App 57, 270 Wis. 2d 675, 678 N.W.2d 293. In that case, the motorist had stopped in an intersection beyond the painted stop line, appeared confused, emitted a strong odor of intoxicants, had bloodshot, glassy eyes, and failed to follow instructions of, or otherwise properly execute, four field sobriety tests. *Id.*, ¶¶4, 6, 9. Those circumstances, we concluded, supported probable cause to request a breath test. *Id.*, ¶10.

¶22 Datka argues, in her case, the circumstances indicating drunk driving are “significantly less.” *Begicevic* is of no help to Datka. While it may be true that Datka performed better on the sobriety tests than the motorist in *Begicevic*, Datka displayed other similar signs of drinking and, most importantly, Datka drove dangerously, a telling circumstance not present in *Begicevic*.

¶23 Whether Coats had probable cause for an arrest before the breath test—a position advanced by the State—is a question we do not have to answer.⁵

⁵ Datka asserts that, if we were to conclude Coats lacked probable cause to request a PBT and the evidence was suppressed, then there would have been no probable cause to arrest her. For its part, the State argues that, even before the PBT was taken, Coats had probable cause to arrest Datka. Given our decision, we need not address these arguments.

The purpose, in fact, of administering a breath test is “to help determine whether there are grounds for arrest.” *Renz*, 231 Wis. 2d at 304. That is how it was used here. If, after balancing the lack of intoxication indicators on one hand against Datka’s dangerous driving, lethargic manner, and mixed sobriety test results on the other, Coats was unsure whether probable cause to arrest existed, then he “was faced with exactly the sort of situation in which a PBT proves extremely useful in determining whether there is probable cause for an OWI arrest.” *Id.* at 317. Under the totality of the circumstances, we conclude that, after the sobriety tests, the evidence that Datka drove drunk surpassed the reasonable suspicion that would warrant an investigative stop, i.e., Coats had statutory probable cause to believe that Datka drove under the influence, justifying the request for a breath test.

By the Court.—Judgment affirmed.

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

