

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 14, 2019

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. 2018AP1326

Cir. Ct. No. 2017TR26646

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

IN RE THE MATTER OF THE REFUSAL OF JAMES M. GREGG:

CITY OF WEST ALLIS,

PLAINTIFF-RESPONDENT,

v.

JAMES M. GREGG,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
JEAN M. KIES, Judge. *Affirmed.*

¶1 BRASH, J.¹ James M. Gregg appeals an order of the circuit court, upholding a decision by the City of West Allis Municipal Court, that Gregg had

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2017-18). All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

improperly refused to submit to one or more chemical tests after being arrested for operating a vehicle while under the influence of an intoxicant (OWI). Gregg argues that the arresting officer did not have probable cause to arrest him for OWI, which is also a requirement for an improper refusal finding, and thus both courts erred in making that finding. We affirm.

BACKGROUND

¶2 On February 14, 2017, at approximately 3:00 a.m., Officer Jacob Kaye of the West Allis Police Department was dispatched to South 58th Street and Mitchell Street after a caller had reported that a “suspicious vehicle” had been parked in the same spot for about forty-five minutes. Officer Kaye observed a silver Audi which matched the description given by the caller; the headlights were on and the vehicle was running—the officer observed exhaust coming from the tailpipe. There were two occupants in the vehicle.

¶3 Officer Kaye passed the Audi and made a U-turn so that he could pull up behind it, activating his squad lights and spotlight. By that time, the Audi had been turned off. When the officer approached the Audi, Gregg was in the driver’s seat. Officer Kaye testified that he could smell alcohol on Gregg’s breath, and that his eyes were red and glassy. Gregg stated that he and the passenger had been at Potawatomi Hotel & Casino earlier and then had gone to Uncle Fester’s, a bar located close to where Gregg’s vehicle was parked. Gregg admitted that he had consumed alcohol at the bar. Officer Kaye requested that Gregg exit the vehicle to perform field sobriety tests. Gregg demonstrated impairment in his performance of the tests. Officer Kaye arrested Gregg for OWI and transported him to the West Allis Police Department.

¶4 At the police department, Officer Kaye asked Gregg whether he would submit to an evidentiary breath test. Gregg refused. Gregg was issued a citation for OWI as well as a notice of intent to revoke his driving privileges due to his refusal to submit to the breath test.

¶5 The municipal court found Gregg not guilty of OWI. Nevertheless, it found that Gregg had made an improper implied consent refusal pursuant to WIS. STAT. § 343.305(9), when he refused to submit to any chemical tests. As a result, Gregg's operating privileges were revoked for one year.

¶6 Gregg appealed that finding to the circuit court. He contended that one of the statutory requirements for improper refusal—that the arresting officer had probable cause to make the arrest for OWI—was not met. *See* WIS. STAT. § 343.305(9)(a)5.a. Gregg asserted that there was insufficient evidence to demonstrate that he had been operating the vehicle, and thus probable cause for his arrest was not established.

¶7 At a hearing held on June 1, 2018, the circuit court affirmed the improper refusal finding by the municipal court. The circuit court found that all of the requirements of WIS. STAT. § 343.305(9)(a)5. had been met, including the probable cause component. This appeal follows.

DISCUSSION

¶8 The issue in this appeal is not whether Gregg was under the influence of an intoxicant; rather, Gregg's appeal is focused on whether there was sufficient evidence to support the probable cause finding that Gregg had *operated* the vehicle while under the influence. Whether there was probable cause to make

an arrest is a question of law that we review *de novo*. *Washburn Cty. v. Smith*, 2008 WI 23, ¶16, 308 Wis. 2d 65, 746 N.W.2d 243.

¶9 “In the context of a refusal hearing following an arrest for operating a motor vehicle while intoxicated, ‘probable cause’ refers generally to that quantum of evidence that would lead a reasonable law enforcement officer to believe” that the driver was operating the vehicle while under the influence of an intoxicant. *Id.*, ¶15 (citation omitted). This determination is based on “the totality of the circumstances within the arresting officer’s knowledge at the time of the arrest”; however, the evidence “need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not.” *State v. Nordness*, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986) (citation omitted). The burden is on the prosecuting entity to establish that the officer had probable cause to make the arrest. *Smith*, 308 Wis. 2d 65, ¶15.

¶10 Here, according to Officer Kaye’s testimony, when he first observed Gregg’s vehicle the headlights were on and the vehicle was running, as evidenced by the exhaust coming from the tailpipe. The vehicle had been turned off by the time Officer Kaye parked his squad and approached the vehicle; however, Gregg was in the driver’s seat. The keys for the vehicle were in Gregg’s possession.

¶11 Furthermore, Gregg admitted that he had been drinking at Uncle Fester’s. Officer Kaye could smell alcohol on Gregg’s breath, and his physical appearance indicated that he was impaired. He subsequently performed poorly on the field sobriety tests that were administered. Based on the totality of these circumstances, Officer Kaye arrested Gregg for OWI.

¶12 Gregg argues that these facts do not establish that he had operated the vehicle. He cites *Village of Cross Plains v. Haanstad*, 2006 WI 16, 288 Wis.

2d 573, 709 N.W.2d 447, where our supreme court determined that there was insufficient evidence to support Haanstad’s arrest for OWI. *Id.*, ¶24. Haanstad was arrested after a police officer observed her in the driver’s seat of a vehicle that was running. *Id.*, ¶¶4-5. Haanstad stated that she had not driven the vehicle; she was just sitting in the driver’s seat, with her body and feet facing the passenger seat where her boyfriend was sitting, while they “discuss[ed] their relationship.” *Id.*, ¶4. The supreme court held that there was “no evidence, direct or circumstantial, that Haanstad touched any controls of the vehicle necessary to put it in motion while she was intoxicated[.]” *Id.*, ¶24.

¶13 The circumstances are different in this case. Here, when Officer Kaye first observed Gregg’s vehicle it was running, although by the time the officer had parked his squad it had been turned off. This fact was noted by the circuit court, which then referenced the definition of “operating a motor vehicle” from WIS. JI—CRIMINAL 2663: “the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.” The court found that Gregg had “physically manipulated” the controls of the vehicle, and therefore had operated it.

¶14 Gregg argues that turning *off* the vehicle does not meet the definition of operating a motor vehicle because it is not a manipulation of the controls to put the vehicle *in* motion. However, this argument ignores the fact that Officer Kaye had seen the vehicle running. Therefore, at some point prior to being turned off, the ignition had been turned on; that is, the vehicle’s controls had been manipulated in a manner that would put it in motion. *See Village of Elkhart Lake v. Borzyskowski*, 123 Wis. 2d 185, 189, 366 N.W.2d 506 (Ct. App. 1985) (“Operation of a motor vehicle occurs either when a defendant starts the motor or leaves it running.”).

¶15 Shortly after seeing the vehicle running, Officer Kaye observed Gregg in the driver's seat, with Gregg in possession of the keys. Furthermore, Gregg admitted he had been drinking; he smelled of alcohol and had red, glassy eyes and he performed poorly on field sobriety tests. Based on those facts, Officer Kaye had probable cause to believe that Gregg had operated the vehicle while under the influence of an intoxicant. *See Smith*, 308 Wis. 2d 65, ¶15.

¶16 Therefore, we conclude that the probable cause requirement of WIS. STAT. § 343.305(9)(a)5.a. was met. Accordingly, we affirm the circuit court's finding of improper refusal.

By the Court.—Order affirmed.

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

