COURT OF APPEALS
DECISION
DATED AND FILED

January 24, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2264-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SUSAN M. CURTIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County: THOMAS R. WOLFGRAM, Judge. *Affirmed.*

¶1 NETTESHEIM, J.[1] Following the denial of her motion to suppress, Susan M. Curtis pled no contest to a charge of operating a motor vehicle while

[1] This opinion is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version.

intoxicated (OWI) pursuant to WIS. STAT. § 346.63(1)(a).[2] Curtis was convicted as a repeat offender.

¶2 Curtis was arrested based upon the results of a preliminary breath test (PBT) and other observations made by the arresting officer. In the trial court, Curtis contended that the arresting officer did not have the requisite probable cause under WIS. STAT. § 343.303 to request the PBT. The trial court rejected this argument. Curtis challenges this ruling on appeal. We affirm.

Facts

¶3 The relevant facts are not in dispute. We take them from the testimony of Deputy Greg Eichstaedt, the sole witness at the motion to suppress hearing. On February 12, 1999, at approximately 8:20 a.m., Curtis drove her motor vehicle into the back of a stopped school bus. Eichstaedt, a thirty-year veteran of police work who had investigated hundreds of OWI incidents, was dispatched to investigate the accident. Curtis told Eichstaedt that she thought the bus was pulling forward, but she could not stop in time to avoid the accident. In Eichstaedt's opinion, weather was not a factor in the accident. Eichstaedt observed a slight odor of intoxicants about Curtis. However, she was able to provide Eichstaedt with relevant identifying information. Curtis suffered lacerations to her arm and hand in the accident, but she declined Eichstaedt's offer to call an ambulance.

[2] Curtis was also charged with operating a motor vehicle with a prohibited alcohol concentration pursuant to WIS. STAT. § 346.63(1)(b). The appellate record does not reflect a disposition of this charge. We assume that this charge was dismissed following Curtis's no contest plea to the OWI charge under § 346.63(1)(a).

¶4 Eichstaedt did not pursue the investigation of Curtis at the scene of the accident because he was the only officer present and he was occupied with directing the heavy traffic in the area. Instead, a tow-truck operator transported Curtis to a nearby medical clinic where she worked. Eichstaedt advised Curtis before she left the scene that he would be speaking with her later about the accident and possible citations.

¶5 Within a half hour, Eichstaedt again contacted Curtis at the nearby medical clinic. By this time, Curtis's injuries had been tended to. Eichstaedt again detected a slight odor of intoxicants about Curtis and he informed her of this observation. Curtis replied that this was from the "night before." Curtis agreed to submit to some field sobriety tests. When performing a balance test, Curtis weaved slightly back and forth, from side to side, and, according to Eichstaedt, she "could not hold standing steady." Because Curtis's hand was bandaged, Eichstaedt did not ask her to perform the finger-to-nose test. Eichstaedt next asked Curtis to submit to a PBT. Curtis agreed. The test result was ".25 percent." Eichstaedt then arrested Curtis for OWI.

¶6 Curtis challenged her arrest by a motion to suppress. She contended that Eichstaedt did not have the requisite probable cause to request a PBT as required by WIS. STAT. § 343.303. The trial court disagreed and denied the motion to suppress. Curtis subsequently pled no contest to OWI and she appeals from the ensuing judgment of conviction.

Discussion

¶7 WISCONSIN STAT. § 343.303 provides in relevant part:

> If a law enforcement officer has probable cause to believe that the person is violating or has violated s. 346.63(1) … the officer, prior to an arrest, may request the person to provide a sample of his or her breath for a preliminary

> breath screening test …. The result of this preliminary breath screening test may be used by the law enforcement officer for the purpose of deciding whether or not the person shall be arrested for a violation of s. 346.63(1) …. The result of the preliminary breath screening test shall not be admissible in any action or proceeding except to show probable cause for an arrest ….

¶8 In ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 603 N.W.2d 541 (1999), the supreme court explained that the purpose of WIS. STAT. § 343.303 is "to allow officers to use the PBT as a tool to determine whether to arrest a suspect and to establish that probable cause for an arrest existed, if the arrest is challenged." ***Renz***, 231 Wis. 2d at 304. The court stated that the statute "maximizes highway safety, because it makes the PBT an effective tool for law enforcement officers investigating possible OWI violations." ***Id***. at 315. The court fixed the level of probable cause under the statute at "a quantum of proof greater than the reasonable suspicion necessary to justify an investigative stop, and greater than the 'reason to believe' that is necessary to request a PBT from a commercial driver, but less than the level of proof required to establish probable cause for arrest." ***Id***. at 316.

¶9 The question in this case is whether the facts observed by Eichstaedt satisfied this level of probable cause. Whether undisputed facts constitute probable cause is a question of law that we review without deference to the trial court. ***State v. Babbitt***, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994). However, despite our de novo standard of review, we value the opinion of the trial court. *See* ***Scheunemann v. West Bend***, 179 Wis. 2d 469, 475, 507 N.W.2d 163 (Ct. App. 1993).

¶10 While probable cause is a varying standard depending on the different burdens of proof that apply at a particular stage of the proceeding, *see*

Renz, 231 Wis. 2d at 308, the core concept of probable cause remains constant. Probable cause "is a test based on probabilities; and, as a result, the facts … 'need only be sufficient to lead a reasonable officer to believe that guilt is more than a possibility.'" ***Dane County v. Sharpee***, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990) (citation omitted). As a result, the probabilities addressed by probable cause are not technical. ***Id***. Instead, they rest on the practical considerations of everyday life upon which reasonable and prudent persons, not legal technicians, act. ***Id***. Bottom line, probable cause represents a commonsense test. ***Id***.

¶11 Here, Curtis concedes that Eichstaedt had reasonable suspicion to suspect that she had operated a motor vehicle while intoxicated, but she disputes that this reasonable suspicion also constituted probable cause to allow Eichstaedt to request that she submit to a PBT under WIS. STAT. § 343.303. Curtis builds her case on the facts derived from other cases, particularly ***Renz***, where the facts demonstrated stronger evidence of probable cause than that demonstrated in this case. In ***Renz***, the supreme court pointed to the strong odor of intoxicants, the defendant's admission to prior drinking, and the defendant's failure to adequately perform certain field sobriety tests in concluding that probable cause under the PBT statute had been established. ***Renz***, 231 Wis. 2d at 316-17.

¶12 Because the facts here are weaker than those in ***Renz***, Curtis reasons that the probable cause requirement of WIS. STAT. § 343.303 has not been met. But the ***Renz*** court did not declare that the facts there represented the minimum level of proof necessary to constitute probable cause under the PBT statute. Nor has any other court fashioned such a hard and fast probable cause standard. In fact, this court has rejected an analysis that rigidly determines probable cause based upon similar or near-similar facts in prior cases. For instance, in ***State v.***

Mata, 230 Wis. 2d 567, 602 N.W.2d 158 (Ct. App. 1999), the State and the defense cited to competing cases, each with factual scenarios supportive of their competing positions on the probable cause question. ***Id***. at 570-72. We saw no need to engage in such factual comparisons because "the question of probable cause turns on the facts of the particular case" and "the totality of the circumstances." ***Id***. at 572.

¶13 Here, Curtis had been involved in a motor vehicle accident that clearly suggested that she was the driver at fault. Eichstaedt testified that the weather was not a contributing factor, and he opined that Curtis "for some unknown reason, either inattentive, too fast, or some other type of reason, had failed to observe the school bus stopped and ran into the back end of the school bus." Those circumstances, coupled with Curtis's unsteadiness during the balance test and the odor of intoxicants, albeit slight, would warrant a reasonable and prudent person, not acting on legal technicalities, to conclude that it was more than a possibility that Curtis was intoxicated at the time she drove into the back of the bus. *See* ***Sharpee***, 154 Wis. 2d at 518. Thus, the probable cause level of WIS. STAT. § 343.303 was satisfied.

¶14 But even in the face of such probable cause, it remained possible that Curtis might not have been intoxicated. Thus, Eichstaedt turned to the PBT process to assist in the decision of whether Curtis should be arrested. As the

supreme court has observed, the PBT procedures of WIS. STAT. § 343.303 were designed to address this very kind of situation.[3] *See* ***Renz***, 231 Wis. 2d at 317.

Conclusion

¶15 We uphold the trial court's determination that probable cause under WIS. STAT. § 343.303 existed to support Eichstaedt's request that Curtis submit to a PBT.

By the Court.—Judgment affirmed.

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

[3] Although we follow the ***Renz*** methodology in this case and uphold the trial court's finding of probable cause, we do not pretend that police officers or judges can easily distinguish the lines between the various stages of probable cause recognized by the law. Thus, we wonder, as did the concurring opinion in ***Renz***, how many angels can be put on the head of this "probable cause" pin.