

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

May 31, 2001

Cornelia G. Clark  
Clerk, Court of Appeals  
of Wisconsin

**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.

**No. 00-3146**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**IN THE MATTER OF THE REFUSAL OF  
CURTIS E. DITTBERNER:**

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**CURTIS E. DITTBERNER,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Dodge County:  
ANDREW P. BISSONNETTE, Judge. *Affirmed.*

¶1 DYKMAN, P.J.<sup>1</sup> Curtis Dittberner appeals from an order revoking his operating privileges for refusing to submit to a test of his blood, pursuant to WIS. STAT. § 343.305.<sup>2</sup> He asserts that the trial court erred by revoking his operating privileges because the State failed to prove that an arresting officer had probable cause to arrest him for operating his motor vehicle while intoxicated (OMVWI). He also argues that he cannot be considered to have refused a chemical test because the State failed to ask him to submit to a test.<sup>3</sup> We conclude

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

<sup>2</sup> WISCONSIN STAT. § 343.305(2) provides in part:

Any person who ... operates a motor vehicle upon the public highways of this state ... is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol ... when requested to do so by a law enforcement officer ....

<sup>3</sup> WISCONSIN STAT. § 343.305(4) provides:

At the time that a chemical test specimen is requested under sub. (3) (a) or (am), the law enforcement officer shall read the following to the person from whom the test specimen is requested:

“You have either been arrested for an offense that involves driving or operating a motor vehicle while under the influence of alcohol or drugs, or both, or you are suspected of driving or being on duty time with respect to a commercial motor vehicle after consuming an intoxicating beverage.

This law enforcement agency now wants to test one or more samples of your breath, blood or urine to determine the concentration of alcohol or drugs in your system. If any test shows more alcohol in your system than the law permits while driving, your operating privilege will be suspended. If you refuse to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties. The test results or the fact that you refused testing can be used against you in court.

(continued)

that sufficient evidence existed, permitting the officer to arrest Dittberner. We further conclude that the evidence supports the trial court's conclusion that Dittberner refused a chemical test after the arresting officer read the "Informing the Accused" form. Accordingly, we affirm.

## **I. Background**

¶2 On November 26, 1999, at 10:37 p.m., Officer Jason Kendall of Beaver Dam received a dispatch stating that an intoxicated driver had pulled into an apartment complex and struck a car, and that someone had observed the driver exiting the vehicle with a beer can in his hand. At the scene, Lieutenant Schubert informed Officer Kendall that Schubert had spoken to witnesses from the apartment complex.

¶3 Kendall and Officer Neja approached the open patio door of Dittberner's apartment, and Dittberner allowed them in. Dittberner was holding a beer can, and Neja noted there were no other cans of beer or any other signs of alcoholic beverages in plain view in the apartment. Upon questioning, Dittberner denied striking any vehicles or driving while intoxicated. Both officers had difficulty understanding his slurred speech, and described him as highly intoxicated.

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If you take all the requested tests, you may choose to take further tests. You may take the alternative test that this law enforcement agency provides free of charge. You also may have a test conducted by a qualified person of your choice at your expense. You, however, will have to make your own arrangements for that test.

If you have a commercial driver license or were operating a commercial motor vehicle, other consequences may result from positive test results or from refusing testing, such as being placed out of service or disqualified."

¶4 The officers took Dittberner out to the patio area of his apartment and conducted field sobriety tests, at which point Schubert told Kendall that witnesses had verified that Dittberner was the man who had struck the vehicle earlier. Officer Kendall administered a horizontal gaze nystagmus (HGN) test to Dittberner and observed all six clues of intoxication. He then asked Dittberner to do a walk and turn test, but Dittberner said that because of back surgery, he was unable to do that. Neja noted that Dittberner had been able to walk from his apartment to the patio area where the tests were being performed. Next, Officer Kendall had Dittberner attempt the alphabet test, which he failed. After Dittberner refused to do any more tests, Officer Kendall placed him under arrest for OMVWI.

¶5 At approximately 11:00 p.m., Kendall took Dittberner to a hospital to determine his blood alcohol content. Kendall read him the “Informing the Accused” form, containing information mandated by WIS. STAT. § 343.305(4), and asked Dittberner several times whether he would submit to an evidentiary chemical test of his blood. Dittberner refused numerous times. Kendall indicated to Dittberner that he wanted Dittberner to provide a blood sample, and explained in lay-person’s terms that this was a blood draw to determine the percentage of alcohol in his blood to establish whether or not Dittberner was legally impaired to drive. After concluding that Dittberner had refused the blood test, Kendall issued him a “Notice of Intent to Revoke Operating Privilege” form.

## **II. Analysis**

### *A. Probable Cause to Arrest*

¶6 Whether the facts of a given case constitute probable cause to arrest is a question of law that we decide without deference to the trial court. *See State*

*v. Kasian*, 207 Wis. 2d 611, 621, 558 N.W.2d 687 (Ct. App. 1996). In *State v. Nordness*, 128 Wis. 2d 15, 35-36, 381 N.W.2d 300 (1986), the supreme court stated that the trial court's probable cause inquiry at a refusal hearing simply involves ascertaining the plausibility of a police officer's account. See also *State v. Wille*, 185 Wis. 2d 673, 681, 518 N.W.2d 325 (Ct. App. 1994). Probable cause to arrest refers to the quantum of evidence that would lead a reasonable police officer to believe that the defendant probably committed a crime. *State v. Paszek*, 50 Wis. 2d 619, 624, 184 N.W.2d 836 (1971). Proof beyond a reasonable doubt need not be established nor does it need to be more likely than not that the defendant committed a crime. *State v. Mitchell*, 167 Wis. 2d 672, 681-82, 482 N.W.2d 364 (1992). In determining probable cause, all of the facts and circumstances apparent to the officer must be taken into account in deciding whether an officer acted reasonably. See *State v. Seibel*, 163 Wis. 2d 164, 183, 471 N.W.2d 226 (1991).

¶7 Dittberner concedes his intoxication at the time of his arrest, but challenges the arrest claiming: (1) the police did not know the amount of time that had elapsed since the accident; (2) the police did not know how much alcohol Dittberner consumed once he entered his apartment; and (3) Dittberner was not accurately identified as the operator of the truck.

¶8 At the suppression hearing, Kendall stated that he arrived at the scene three to five minutes after the dispatch call came in. Dittberner's apartment door was open despite the fact that it was late November. Both Neja and Kendall observed that Dittberner was highly intoxicated. And yet, Neja noted in his report that there were no visible signs of alcohol consumption in Dittberner's apartment other than the beer in his hand. In addition, one witness stated that the man who struck the parked car had emerged from his vehicle holding a can of beer.

Considering all these circumstances and the results of the field sobriety tests, Kendall could have reasonably concluded that Dittberner had been the driver of the vehicle that struck the parked car, and that he was already highly intoxicated at the time.

¶9 All of Dittberner's arguments relate to what he views as gaps in the officers' knowledge of the facts. But a reviewing court must look at the entirety of the facts and information available to the officer at the time of the arrest, from a common sense perspective. *See County of Dane v. Sharpee*, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990). The presence of *some* facts or inferences that tend to show innocence does not preclude a determination that a reasonable officer would have had probable cause to arrest, based on *all* of the circumstances. Dittberner's extreme level of intoxication, the witnesses who identified Dittberner as the driver, the beer can in his hand as he exited the vehicle, his excuse for not performing the walking test even though he had walked well from the apartment to the sidewalk, and the lack of visible alcohol consumption in his apartment all contribute to the determination of probable cause. We conclude that a reasonable police officer would have had probable cause to arrest Dittberner for OMVWI.

#### *B. Blood Test Refusal*

¶10 Dittberner claims that Officer Kendall never asked: "Will you submit to an evidentiary chemical test of your blood, breath, or urine?" after Kendall read him the "Informing the Accused" form. Dittberner argues that he cannot have refused something he was not asked. Determining the requirements of WIS. STAT. § 343.305 presents an issue of statutory interpretation. This is a question of law for our de novo review. *See State v. Stary*, 187 Wis. 2d 266, 269, 522 N.W.2d 32 (Ct. App. 1994). The question of whether Dittberner refused a

blood, breath, or urine test after Kendall read the “Informing the Accused” form is an issue of fact. We will not set aside a trial court’s factual findings unless those findings are clearly erroneous, and we give due regard to the trial court’s opportunity to assess the credibility of the witnesses. WIS. STAT. § 805.17(2); *State v. Byrge*, 2000 WI 101, ¶33, 237 Wis. 2d 197, 614 N.W.2d 477. Under this standard, where there is conflicting testimony, the trial judge is the ultimate arbiter of the credibility of the witnesses. *Cogswell v. Robertshaw Controls Co.*, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979).

¶11 WISCONSIN STAT. § 343.305(4) only requires officers to read the four paragraphs it contains when they request a chemical specimen. The question beginning “Will you submit ....” is not part of the four paragraphs, but merely part of a form used by the police. “Once there has been a proper explanation and there has been a refusal ... a refusal has occurred under the statute and the accused is subject to the consequence of a mandatory suspension.... The obligation of the accused is to take the test promptly or to refuse it promptly.” *State v. Rydeski*, 214 Wis. 2d 101, 108, 571 N.W.2d 417 (Ct. App. 1997) (quoting *State v. Neitzel*, 95 Wis. 2d 191, 205, 289 N.W.2d 828 (1980)).

¶12 Officer Kendall testified: “I explained to him the form numerous times and asked that—if he understood it. Mr. Dittberner stated he understood the form, but stated he still refused to submit to the test.” From this testimony, we cannot conclude that the trial court’s finding that Dittberner refused to submit to the test after Officer Kendall read him the “Informing the Accused” form was clearly erroneous.

*By the Court.*—Order affirmed.

Not recommended for publication in the official reports. *See* WIS.  
STAT. RULE 809.23(1)(b)4.



