

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 16, 2001

Cornelia G. Clark
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.

No. 01-0243

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**IN THE MATTER OF THE REFUSAL OF ROBERT C.
NIEBUHR:**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT C. NIEBUHR,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County:
PATRICK J. FIEDLER, Judge. *Affirmed.*

¶1 LUNDSTEN, J.¹ Robert C. Niebuhr appeals from a court order revoking his driving privileges for refusal to submit to a breath test. For the following reasons, we affirm.

FACTS

¶2 On September 25, 1999, Niebuhr was arrested for operating a motor vehicle while under the influence of an intoxicant, contrary to WIS. STAT. § 346.63(1)(a) (1997-98). After Niebuhr refused to submit to an evidentiary chemical test of his breath, he was issued a notice of intent to revoke his operating privileges. Niebuhr subsequently requested a refusal hearing on the revocation pursuant to WIS. STAT. § 343.305(9)(a) (1997-98). At the hearing, Niebuhr conceded all issues relevant to a refusal hearing pursuant to § 343.305, except whether the arresting officer had probable cause to believe Niebuhr was unlawfully intoxicated.

¶3 At the refusal hearing, Officer Kara Christenson testified that she had been a police officer for two and one-half years. Prior to accepting a position as an officer at the Village of Waunakee, Officer Christenson obtained her bachelor's degree in criminal justice and attended the Law Enforcement Recruit School at Fox Valley Technical College. Thereafter, Officer Christenson received additional training in intoxilyzer, field sobriety, radar, and drug investigation techniques. During her training course in field sobriety, Officer Christenson

¹ 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.

learned how to conduct various field sobriety tests using a point system to detect whether a person is intoxicated to the degree that he should not be driving.

¶4 Officer Christenson also testified that in addition to assisting various officers with the arrests of persons for operating a motor vehicle under the influence, she had personally arrested more than ten but less than fifty people for that offense. Additionally, Officer Christenson encounters people under the influence on a daily basis. Officer Christenson testified that how a person performs on the field sobriety tests is an indicator of whether his blood alcohol is over the legal limit.

¶5 On September 25, 1999, at approximately midnight, Officer Christenson observed a vehicle with a headlight out. After following the vehicle for a short distance, Officer Christenson noted that the vehicle was driving within one-half car length of the vehicle ahead of it. She activated her emergency lights to conduct a traffic stop. After traveling about one-tenth of a mile, the car pulled to the side of the road. Niebuhr was the driver of the vehicle.

¶6 Upon requesting Niebuhr's license, Niebuhr removed a tri-fold wallet from his pocket. Although the license was in the upper fold of the wallet, and visible to Officer Christenson immediately, Niebuhr continued to rummage through the middle part of his wallet looking for it until his wife pointed out the license to him. Officer Christenson noticed a strong odor of intoxicants coming from Niebuhr. She also noted that his speech was slurred and was what she described as "thick-tongued."

¶7 Niebuhr admitted to Officer Christenson that he had come from an anniversary party where he consumed four to five beers. Officer Christenson then asked Niebuhr if he would submit to field sobriety testing. Upon exiting his

vehicle, Niebuhr used the side of the car to pull himself out, he swayed from left to right, and he braced himself using the vehicle as he walked to the back of the car. Officer Christenson then asked Niebuhr whether he had any leg ailments that would prohibit him from successfully performing the tests. Niebuhr indicated that he had no leg ailment, but he did have a hip ailment. Officer Christenson believed that she asked Niebuhr whether his hip ailment would prohibit him from performing the tests, to which Niebuhr responded “no.”²

¶8 Niebuhr was asked first to recite the alphabet from M to Z. Though Niebuhr did not miss any letters, he recited them quickly and quietly, contrary to Officer Christenson’s instructions. When Officer Christenson asked Niebuhr to repeat the test, he did so. Niebuhr asked, however, to begin with the letter A rather than the letter M because he had difficulty starting in the middle of the alphabet.

¶9 Officer Christenson then asked Niebuhr to do the “walk-and-turn” test. Niebuhr was instructed to walk nine steps in a heel-to-toe fashion on a straight line keeping his hands to his sides, pivot on his front foot, and then return. Niebuhr did not walk heel-to-toe. Rather, his feet were at least four inches apart. Additionally, he stepped off the line with each step, and though he attempted to use his arms for balance, he swayed from left to right. When he finished walking nine steps, he stopped and Officer Christenson needed to tell him again to return.

² On cross-examination, Officer Christenson again reiterated her belief that she asked Niebuhr whether his hip ailment would prohibit him from engaging in the testing, though she admitted it was “possible” she did not.

¶10 Niebuhr was also asked to perform the “one-leg stand” test. Officer Christenson instructed Niebuhr to stand on either leg, while holding the other leg six inches off the ground with the toe pointed and, keeping his arms at his sides, to count from 1001 to 1030. Niebuhr stood on his right leg with his left leg raised three to four inches off the ground. He initially lost his balance and, upon attempting the test a second time, he counted to 1006 before losing his balance again. Because Officer Christenson had to catch Niebuhr from falling, she stopped the test.

¶11 Finally, Niebuhr was asked to submit to a preliminary breath test but he refused. Based on the totality of the circumstances, including his driving, the odor of intoxicants, and his performance on the field sobriety tests, Officer Christenson arrested Niebuhr for operating a motor vehicle while under the influence of an intoxicant, contrary to WIS. STAT. § 346.63(1)(a) (1997-98).

¶12 After listening to Officer Christenson’s testimony and after viewing a police video of the incident, the trial court found that Officer Christenson had probable cause to believe Niebuhr was operating his vehicle under the influence. The court based its decision upon Officer Christenson’s testimony, which it found to be credible, that Niebuhr was following the vehicle in front of him too closely, that he had trouble finding his license, that he smelled of alcohol, that he spoke with slurred speech, that he admitted to having four to five beers, and that he performed poorly on the field sobriety tests. The court also based its decision upon its viewing of the police video, which the court stated showed Niebuhr stumbling during the testing. Finally, the court considered the fact that Niebuhr refused the preliminary breath test.

¶13 The court then imposed a mandatory one-year revocation period, and Niebuhr appealed.

DISCUSSION

¶14 The sole issue on appeal is whether Officer Christenson had probable cause to arrest Niebuhr for driving under the influence of an intoxicant.

¶15 On appeal, Niebuhr argues that Officer Christenson's testimony at the hearing established only that Niebuhr had been drinking on the night in question, not that he was "[u]nder the influence of an intoxicant," as that phrase is used in WIS. STAT. § 346.63(1)(a) (1997-98). Specifically, he contends that a burned-out headlight and an odor of intoxicants are insufficient to establish probable cause that one is under the influence of an intoxicant. Niebuhr also asserts that Officer Christenson was unable to draw a conclusion that he was under the influence from his "slurred" speech, the manner in which he drove and exited his vehicle, and his performance on the field sobriety tests.

¶16 One issue a court must decide at a refusal hearing is whether the arresting officer had probable cause to believe the defendant was operating his vehicle under the influence of alcohol. *State v. Wille*, 185 Wis. 2d 673, 679, 518 N.W.2d 325 (Ct. App. 1994). Probable cause generally refers to "that quantum of evidence which 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). Probable cause exists where the totality of the circumstances would lead a reasonable officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant. *State v. Nordness*, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986).

¶17 At a refusal hearing, the court is not to weigh the competing evidence when determining probable cause. *Id.* at 36. At this proceeding, the court need not believe the officer's account of the events, so long as the State has proven the officer's account is plausible. *Wille*, 185 Wis. 2d at 681. This is because the implied consent statute limits the refusal hearing to a determination of probable cause, rather than a determination of probable cause to a reasonable certainty. *Nordness*, 128 Wis. 2d at 36.

¶18 After reviewing the record and the applicable case law, we find Niebuhr's arguments to be without merit. Initially, Niebuhr attempts to show that Officer Christenson's testimony was insufficient to find probable cause by compartmentalizing each predictor testified to by the officer and simultaneously arguing that it alone does not prove intoxication. In determining whether probable cause exists, however, courts must consider the totality of the circumstances, not isolated factors that alone may establish nothing. *See id.* at 35.

¶19 Here, there was evidence that Niebuhr was closely tailing the car in front of him, which Officer Christenson indicated was one sign that a driver may be intoxicated. There was also evidence that Niebuhr could not locate his clearly visible license, and that he could not walk without swaying and bracing himself on the vehicle. Officer Christenson testified that Niebuhr smelled of alcohol and that his speech was slurred and "thick-tongued." She testified that odors of intoxicants and slurred, "thick-tongued" speech tend to be accurate predictors that a person is intoxicated. Additionally, Officer Christenson testified that Niebuhr did not follow directions on the field sobriety tests and that he could not successfully complete the tests. Officer Christenson terminated the testing because Niebuhr was not following directions, he could not keep his arms at his sides as instructed, and he could not keep his balance. Given all these factors, the trial court correctly

concluded that there was probable cause to believe that Niebuhr was driving under the influence.

¶20 Additionally, we note that an unusual manner of driving, the odor of intoxicants, poor balance, swaying, slurred speech, and a person's poor performance on the "one-leg stand" test and the "walk-and-turn" test are all factors which Wisconsin courts have repeatedly relied upon in combination to determine that an officer had probable cause to believe a suspect was driving under the influence of intoxicants. *See, e.g., County of Jefferson v. Renz*, 231 Wis. 2d 293, 316-17, 603 N.W.2d 541 (1999); *Nordness*, 128 Wis. 2d at 36-37; *State v. Babbitt*, 188 Wis. 2d 349, 357, 525 N.W.2d 102 (Ct. App. 1994); *Wille*, 185 Wis. 2d at 683-84. *See also State v. Swanson*, 164 Wis. 2d 437, 453 n.6, 475 N.W.2d 148 (1991).

¶21 Having concluded that Officer Christenson had probable cause to arrest Niebuhr for operating his vehicle while under the influence of an intoxicant, we affirm the trial court's order revoking Niebuhr's driving privileges.

By the Court.—Order affirmed.

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

