

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 25, 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. 01-0739

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**IN THE MATTER OF THE REFUSAL OF DARRELL J.
SHEARER:**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DARRELL J. SHEARER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Sauk County:
GUY D. REYNOLDS, Judge. *Affirmed.*

¶1 DEININGER, J.¹ Darrell Shearer appeals an order revoking his operating privilege for refusing to submit to a chemical test of his blood alcohol concentration under WIS. STAT. § 343.305. He claims the trial court erred in concluding that the arresting officer had probable cause to arrest him for operating a motor vehicle while under the influence of an intoxicant (OMVWI) before requesting a blood test. We disagree and affirm the revocation order.

BACKGROUND

¶2 A Sauk County Sheriff's deputy stopped the vehicle Shearer was driving and arrested him for OMVWI. The deputy transported Shearer to a local hospital to obtain a blood sample, but Shearer refused to submit to the drawing of a sample of his blood. He requested a refusal hearing under WIS. STAT. § 343.305(9).

¶3 The arresting deputy testified that Sauk County had received a radio report from the Dane County Sheriff's office regarding a "high-speed vehicle northbound on Highway 12." The report included a description of the vehicle with Illinois license plates, and the fact that it had a headlight out. The deputy traveled in his squad car to the area of the reported vehicle, and he met a car that met the description in the report from Dane County.

¶4 The deputy testified that he followed the vehicle, during which time it "crossed completely into the southbound lane of traffic" for several seconds and then "drifted back slowly into the correct lane of travel." The deputy then stopped

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.

the vehicle and identified its driver as Shearer. The deputy instructed Shearer to get out of his vehicle, and when he did so, the deputy noted a “strong odor of intoxicants about him,” that his eyes were “extremely bloodshot,” and that his steps were “measured,” which the deputy said meant that it appeared Shearer “was searching for the ground.” Shearer told the deputy that “they were drinking the night prior in Illinois,” and the deputy requested him to perform field sobriety tests.

¶5 According to the deputy, Shearer initially declined to perform “any tests.” The deputy then informed Shearer that he needed “some measure” by which to evaluate Shearer’s capacity to drive, and that if Shearer did not perform the tests, the deputy would need to arrest him for OMVWI. Shearer then agreed to perform the tests, and the deputy testified that Shearer’s performance on the “one-leg stand” test and on the “heel-to-toe test” was satisfactory. On the “ABC test,” however, Shearer stopped “about halfway through,” and on the “balance test” Shearer exhibited a “significant amount of swaying.” The deputy also requested Shearer to perform the “finger-to-nose test,” and instead of touching the tip of his nose, Shearer touched “the upper bridge of his nose and subsequently would fish for the tip of his nose.”

¶6 The State also presented testimony from a Baraboo police officer and another Sauk County deputy, who were both present during the stop, and from a Middleton police officer who had earlier stopped Shearer for speeding in Dane County. The trial court found in its bench decision that the deputy had complied with the “informing the accused” requirement, and that Shearer refused to submit

to a blood test.² On the issue of whether the deputy had probable cause to arrest Shearer for OMVWI, the court made the following findings and conclusions:

The standard is whether or not the -- there was evidence which would lead a reasonable officer to believe that the defendant has committed the offense. There is evidence in this case certainly that the -- [officer] was informed that there was a vehicle that basically met the defendant's vehicle's description proceeding in this direction from Dane County, the vehicle had a headlight out, and in this case certainly the defendant's headlight was out.

There was testimony of a significant weave, crossing over the centerline for a few seconds. The -- that evidence is more than sufficient certainly to justify the stop initially.

The officer then detected on the defendant's breath the odor of intoxicants. Defendant indicated that he had been drinking at some point earlier. The defendant's car, of course, was not speeding which had been the information that had been received. The officer was repeatedly asked the question that certainly indicated forthrightly that the car was not speeding when he observed it, the defendant's car.

The defendant's eyes were bloodshot. He appeared to be searching for the ground when he took his steps initially getting out of the car. No single one of those or any of the observations of the officer in and of itself amounts to probable cause, but the Court finds that the combination of the factors observed which I have just indicated and the additional factors which I will indicate do support a finding that the officer -- and conclusion had, that the officer had probable cause to arrest the defendant.

The defendant was asked to do field sobriety tests which he ultimately did do. Once again, the results were somewhat mixed, but the fact that the defendant was unable to get past more than about midway through the alphabet, given the evidence that the defendant is apparently certainly able to understand and know -- knows the

² See WIS. STAT. § 343.305(4). Neither of these findings is contested on appeal.

alphabet, knows the English language, he was only able to get through about midway.

The defendant swayed back and forth during the so-called balance test. His performance on the finger-to-nose test, so-called test, was -- was less than satisfactory to the officer and this was an experienced officer who's conducted these kinds of tests on numerous occasions over the course of a lengthy career and the sum total of the tests and observations support the conclusion that there was probable cause to arrest the defendant and the arrest was lawful.

¶7 The court subsequently entered an order revoking Shearer's Wisconsin operating privilege for twelve months. Shearer appeals the order.

ANALYSIS

¶8 We will uphold a trial court's factual findings unless they are clearly erroneous, WIS. STAT. § 805.17(2), but whether those facts constitute probable cause to arrest is a question of law which we decide de novo. *State v. Kasian*, 207 Wis. 2d 611, 621, 558 N.W.2d 687 (Ct. App. 1996). Our task is to determine, based on the totality of the circumstances within the knowledge of the arresting deputy at the time of Shearer's arrest, whether a reasonable law enforcement officer could conclude that Shearer had probably committed OMVWI. *Id.*; *State v. Wille*, 185 Wis. 2d 673, 682, 518 N.W.2d 325 (Ct. App. 1994).

¶9 Shearer's challenge to the finding of probable cause in this case is essentially as follows. The odor of intoxicants and the fact of having bloodshot eyes during an early morning traffic stop, in and of themselves, are not "an indicator of intoxication." In order to carry its burden, the State must therefore establish some level of impairment of Shearer's ability to safely operate a motor vehicle, and the sobriety tests to which the deputy testified at the hearing are inadequate to do so. Specifically, Shearer claims that the tests employed were

“entirely subjective,” and that the State failed to establish a correlation between performance on the tests and a level of intoxication or driving impairment.

¶10 We reject Shearer’s suggestion that, before a court may credit at a refusal hearing an officer’s observations and evaluation of a defendant’s performance on field sobriety tests, some unspecified foundation beyond the experience and training of the deputy needs to be placed in the record. Shearer notes the importance that Wisconsin case law places on the administration of field sobriety tests prior to an officer’s arrest of a driver for OMVWI. *See State v. Swanson*, 164 Wis. 2d 437, 453 n.6, 475 N.W.2d 148 (1991). He cites no authority, however, for the proposition that an officer’s testimony regarding his or her observations and evaluation of the driver’s performance on the sobriety tests must be supplemented with any extrinsic evidence regarding the validity or efficacy of the tests.

¶11 Indeed, *Swanson*, on which Shearer relies, suggests just the opposite: “A field sobriety test could be as simple as a finger-to-nose or walk-a-straight-line test.” *Id.* (noting that the purpose of the tests is to assist an officer in evaluating “whether the suspect’s physical capacities were sufficiently impaired by the consumption of intoxicants to warrant an arrest”). Moreover, a refusal hearing is “not ... a forum to weigh the state’s and the defendant’s evidence.” *State v. Nordness*, 128 Wis. 2d 15, 36, 381 N.W.2d 300 (1986). “The State need only show that the officer’s account is plausible, and the court will not weigh evidence for and against probable cause or determine the credibility of the witnesses.” *Wille*, 185 Wis. 2d at 681 (citation omitted). We conclude the State amply met its burden at Shearer’s refusal hearing.

¶12 The determination of probable cause is a “commonsense test,” and it requires the court to assess the reasonableness of an officer’s belief that a person has committed the offense of OMVWI. *County of Dane v. Sharpee*, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990). In doing so, a court may give appropriate weight to an officer’s past experience in evaluating the level of impairment of drivers suspected of OMVWI. *Wille*, 185 Wis. 2d at 683. Here, the deputy testified: (1) that he had twenty-four years experience as a sheriff’s deputy; (2) that he had employed the tests he administered to Shearer on numerous prior occasions; (3) that the tests in question were those that he was given “by a field training officer when I initially started with the Sheriff’s Department back in 1977”; and (4) that the deputy found these tests to be “useful in assisting me in determining a person’s condition to drive.” The deputy also testified that no single test was determinative, and that his observations of the driver beyond just performance on the tests go into his determination as to whether to arrest a driver for OMVWI:

In addition to the physical tests, there are field sobriety tests commonly referred to, judgment in the case, driving conduct, whether there are any other instances involved in the matter that would suggest there was something wrong; but it isn’t just solely based on each and every single field sobriety test. It’s many factors put together.

¶13 In short, we conclude that the trial court did not err in considering the deputy’s testimony regarding Shearer’s performance on field sobriety tests, together with the deputy’s other observations indicating that Shearer’s ability to safely operate a motor vehicle were impaired at the time of his arrest. We do likewise here. The other indications that Shearer was probably OMVWI include the fact that he had previously been stopped for speeding in an adjacent county; that his vehicle was reported to be traveling at high speed as it entered Sauk

County; that Shearer’s vehicle weaved completely into the oncoming lane of traffic prior to the stop; and that Shearer exhibited a strong odor of alcohol, bloodshot eyes, and “measured” steps when he got out of his vehicle. These observations, together with the deputy’s evaluation of Shearer’s alertness and physical dexterity during field sobriety testing, formed a reasonable basis for the deputy to conclude that Shearer had probably committed OMVWI.

CONCLUSION

¶14 For the reasons discussed above, we affirm the revocation order.

By the Court.—Order affirmed.

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

