

**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. 01-0929

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**IN THE MATTER OF THE REFUSAL
OF DANIEL R. NEHRING:**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DANIEL R. NEHRING,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County:
MORIA G. KRUEGER, Judge. *Affirmed.*

¶1 ROGGENSACK, J.¹ Defendant-appellant Daniel R. Nehring appeals an order, entered after a refusal hearing under Wisconsin's implied

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). Additionally, all further references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

consent law, which revoked his driver's operating privileges for one year. Nehring was arrested on August 11, 2000, after he drove his truck into a tree located near a parking area behind two residential duplexes. At the time of his arrest, Nehring admitted that he had been drinking, but he refused to take a chemical test. The only issue contested on appeal is whether the arresting officer had probable cause to believe that Nehring had committed the offense of operating a motor vehicle on a public highway while intoxicated. As explained below, a reasonable police officer could have concluded from the totality of the circumstances known at the time of the arrest that Nehring probably had violated WIS. STAT. § 346.63(1)(a). Accordingly, the circuit court's order is affirmed.

BACKGROUND

¶2 Officer Alison Radzicki arrested defendant-appellant Daniel R. Nehring for operating a motor vehicle while intoxicated (OMVWI), contrary to WIS. STAT. § 346.63(1)(a). Radzicki had been dispatched to the scene where the arrest was made after the police received a report that a truck had driven through a yard and struck a tree. Upon arriving at the location of the accident, Radzicki encountered Nehring, who told her that he was driving the truck into his driveway when the clutch stuck and he lost control. Nehring admitted that he had been drinking that evening, but he admitted only that he had been driving on private property.

¶3 Based on what she observed at the scene, Radzicki made the decision to arrest Nehring. She informed him of the State's implied consent law and of the consequences of refusing to submit to a chemical test. Nehring nonetheless refused to submit to the requested test.

¶4 Due to Nehring's refusal, he received notice of the State's intent to revoke his operator's license. He requested a refusal hearing. At that hearing, Nehring's attorney stipulated that the only disputed issue was whether Radzicki had probable cause to arrest Nehring. In particular, the parties disputed whether there was any evidence from which a reasonable officer could have inferred that Nehring had operated the vehicle in an area prohibited by statute.

¶5 The circuit court stated its findings and concluded that there was probable cause for the arrest. Relying primarily on Radzicki's testimony concerning the physical location and orientation of the truck when it collided with the tree and Nehring's statement to Radzicki that he was driving "into" the driveway when he lost control, the circuit court concluded the officer had probable cause to believe that Nehring violated WIS. STAT. § 346.63(1)(a). This is so because a reasonable officer could conclude from the available facts and circumstances that Nehring's probable point of entry into the driveway was from Dawes Street, a public highway.

¶6 On appeal, Nehring contends there is insufficient evidence to support even an inference that he had operated his vehicle on a public highway. Nehring also contends that Radzicki's determination of probable cause was improperly based on an incorrect interpretation of the law.

DISCUSSION

Standard of Review.

¶7 Whether the facts as found constitute probable cause to arrest is a question of law that we review without deference to the circuit court. *State v. Babbitt*, 188 Wis. 2d 349, 356, 525 N.W.2d 102, 104 (Ct. App. 1994).

Additionally, whether the refusal to take a chemical test to determine alcohol concentration in a driver's body is reasonable is a question of law which we review *de novo*. *State v. Ludwigson*, 212 Wis. 2d 871, 875, 569 N.W.2d 762, 764 (Ct. App. 1997).

Probable Cause to Arrest.

¶8 Under Wisconsin's implied consent law, any person who operates a motor vehicle upon a public highway and who is arrested for a violation of WIS. STAT. § 346.63(1)(a) is deemed to have consented to one or more tests for the purpose of determining the presence or quantity of alcohol in his body, when requested to do so by a law enforcement officer. WIS. STAT. §§ 343.305(3)(a), 305(1)-(3)(a). If a person refuses to take such a test, a notice of intent to revoke that person's operator's license is issued and the person becomes entitled to a hearing on the revocation. Section 343.305(9).

¶9 One of the issues properly addressed at a refusal hearing is whether the officer had probable cause to believe the person was operating a motor vehicle while under the influence of alcohol. WIS. STAT. § 343.305(9)(a)5.; *State v. Wille*, 185 Wis. 2d 673, 679, 518 N.W.2d 325, 327 (Ct. App. 1994). In determining probable cause, the officer's conduct is measured against an objective, not a subjective, standard. *Id.* at 682, 518 N.W.2d at 329. The test is whether the facts and circumstances known to the police officer would lead a reasonable officer to conclude that the defendant had violated WIS. STAT. § 346.63(1)(a). *State v. Koch*, 175 Wis. 2d 684, 701, 499 N.W.2d 152, 161 (1993); *State v. Nordness*, 128 Wis. 2d 15, 35, 381 N.W.2d 300, 308 (1986). The information available to the officer must lead a reasonable officer to believe that guilt is more than a possibility, *State v. Wilson*, 229 Wis. 2d 256, 267-68, 600 N.W.2d 14, 20 (Ct.

App. 1999), *review denied*, 230 Wis. 2d 275, 604 N.W.2d 572, but need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not. *State v. Griffin*, 220 Wis. 2d 371, 386, 584 N.W.2d 127, 133 (Ct. App. 1998).

¶10 Radzicki testified that she believed Nehring had entered the driveway from Dawes Street. Nehring argues that a reasonable officer could not have believed that he had driven on Dawes Street, a public highway. We disagree. The front of the truck was angled away from Dawes Street as it struck the tree, and Nehring told the officer that he lost control of the vehicle after he drove into the driveway. These facts were sufficient to support a reasonable belief that Nehring had driven on a public highway. As there is no contest about his intoxicated state at the time of the collision, a reasonable officer would have had probable cause to believe he was driving while under the influence of an intoxicant.

¶11 As the circuit court explained:

There is no reason—and it appears to me from the pictures it's probably not even possible without substantial damage—to believe that the defendant was approaching the area where he ended up from anyplace else but from Dawes Street. ... [T]he placement of the vehicle within the parameters of what we're discussing, plus the use of the defendant's word "into", all lead me to believe that the point of entry was from a public highway. That being the case then the defendant would have been operating upon a public highway.

¶12 Nehring further contends that his arrest was unjustified because Radzicki based the arrest upon an improper view of the elements of an OMVWI offense. This argument is based upon Radzicki's testimony that, at the time of the arrest, she believed that it did not matter *where* Nehring had operated the vehicle.

She also testified that she had based her decision to arrest Nehring upon that incorrect view of the law.²

¶13 Under the objective test that applies to determinations of probable cause, Nehring's argument concerning Radzicki's misunderstanding of the law has no merit. The arresting officer's subjective state of mind is irrelevant. *State v. Kiekhefer*, 212 Wis. 2d 460, 484, 569 N.W.2d 316, 329 (Ct. App. 1997). The question is simply whether a reasonable police officer could have concluded from the totality of the circumstances known at the time of the arrest that Nehring probably had committed a violation of WIS. STAT. § 346.63(1)(a). The State presented evidence sufficient to establish probable cause under this standard.

¶14 Nehring's citation to *State v. Longcore*, 226 Wis. 2d 1, 594 N.W.2d 412 (Ct. App. 1999), *aff'd by an equally divided court*, 2000 WI 23, 233 Wis. 2d 278, 607 N.W.2d 620, on the issue of an officer's mistaken view of the law is misplaced. In *Longcore*, the court held that an officer who erroneously applies the law to the facts does not have probable cause to believe the law was violated: "If the facts would support a violation *only under a legal misinterpretation*, no violation has occurred, and thus by definition there can be no probable cause that a violation has occurred." 226 Wis. 2d at 8-9, 594 N.W.2d at 416 (emphasis added). Because the statute at issue in *Longcore* required interpretation and that issue had

² Despite admitting that she misunderstood the elements of an OMVWI violation, as explained above, Radzicki also testified that at the time she arrested Nehring, she had assumed that Nehring drove the truck into the driveway from the public street in front of the duplexes. The court does not view this testimony to be inconsistent with Radzicki's testimony concerning her misunderstanding of the elements of an OMVWI offense. Police officers might reasonably form an opinion on a particular factual issue even though they do not believe that the fact is an actual element of the charged offense. In any event, as discussed below, Radzicki's subjective beliefs do not factor into the determination of probable cause.

not been sufficiently briefed, the court remanded the matter to the circuit court to determine whether the facts proved at the motion hearing constituted a violation of the statute. *Id.* at 9-10, 594 N.W.2d at 416-17.

¶15 In this case, there was probable cause to support Nehring's arrest under the proper interpretation of WIS. STAT. § 346.63(1)(a) even though Radzicki misunderstood the elements of the offense at the time of the arrest. That is, notwithstanding Radzicki's subjective belief, the facts proved at Nehring's refusal hearing support a violation of the OMVWI statute. *See State v. Baudhuin*, 141 Wis. 2d 642, 648-51, 416 N.W.2d 60, 62-63 (1987) ("[T]he fact that the officer does not have the state of mind which is hypothesized by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." (quoting *Scott v. United States*, 436 U.S. 128, 138 (1978))).

CONCLUSION

¶16 For the reasons explained above, a reasonable police officer could have concluded from the totality of the circumstances known at the time of the arrest that Nehring probably had violated WIS. STAT. § 346.63(1)(a). Accordingly, the circuit court's order is affirmed.

By the Court.—Order affirmed.

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

