COURT OF APPEALS
DECISION
DATED AND FILED

November 28, 2001

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1696-FT **Cir. Ct. No. 99-TR-12711**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DIANE K. BUTZ,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Fond du Lac County: PETER L. GRIMM, Judge. *Affirmed*.

¶1 ANDERSON, J.[1] Diane K. Butz appeals from the decision of the trial court finding that her refusal to submit to chemical testing was unreasonable. In this appeal, she challenges the credibility of the arresting officer and contends

[1] This is a one-judge appeal 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.

that if the finder of fact would "discount[] the untruths told by the arresting officer," there was no probable cause to arrest her for operating a motor vehicle while under the influence of an intoxicant. We affirm because at the refusal hearing, the State met its burden of establishing that the officer's account was plausible.

¶2 ***State v. Nordness***, 128 Wis. 2d 15, 381 N.W.2d (1986), is instructive on (1) the issues within a refusal hearing, and (2) the State's burden at the refusal hearing. ***Nordness*** teaches that the refusal hearing is strictly limited to the issues found in WIS. STAT. § 343.305(9)(a)5a through c. ***Nordness***, 128 Wis. 2d at 26. Those issues are:

> 5. That the issues of the hearing are limited to:
>
> a. Whether the officer detected any presence of alcohol, controlled substance, controlled substance analog or other drug, or a combination thereof, on the person or had reason to believe that the person was violating or had violated s. 346.63(7).
>
> b. Whether the officer complied with sub. (4).
>
> c. Whether the person refused to permit the test. The person shall not be considered to have refused the test if it is shown by a preponderance of evidence that the refusal was due to a physical inability to submit to the test due to a physical disability or disease unrelated to the use of alcohol, controlled substances, controlled substance analogs or other drugs.

Sec. 343.305(9)(a)5a through c.

¶3 ***Nordness*** also puts in plain words that the State has a very low threshold to clear to establish that a driver unreasonably refused to submit to a chemical test.

> We deem the evidentiary scope of a revocation hearing to be narrow. In terms of the probable cause issue, the trial court in a revocation hearing is statutorily required merely

> to determine that probable cause existed for the officer's belief of driving while intoxicated.
>
> We view the revocation hearing as a determination merely of an officer's probable cause, not as a forum to weigh the state's and the defendant's evidence. Because the implied consent statute limits the revocation hearing to a determination of probable cause—as opposed to a determination of probable cause to a reasonable certainty—we do not allow the trial court to weigh the evidence between the parties. The trial court, in terms of the probable cause inquiry, simply must ascertain the plausibility of a police officer's account.

Nordness, 128 Wis. 2d at 36-37 (citation omitted).

¶4 From ***Nordness***, we extract two principles that we will follow when deciding Butz's challenges. First, the trial court is not to weigh the competing evidence when determining probable cause. ***Id.*** at 36. Second, the trial court need not believe the officer's account of the events, so long as the State has proven that the officer's account is plausible. ***Id.***; ***State v. Wille***, 185 Wis. 2d 673, 681, 518 N.W.2d 325 (Ct. App. 1994). These principles are self-evident 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.[2] ***Nordness***, 128 Wis. 2d at 36.

¶5 In our review of Butz's challenge to the credibility of the arresting officer, we need not recite the facts that she uses to challenge the police officer's testimony. It is sufficient to say that she has presented examples of inconsistencies in the police officer's testimony as well as evidence that might be interpreted as discrediting the officer's truth and veracity; however, the officer's

[2] The probable cause the trial court is looking for is a flexible, commonsense measure of the plausibility of particular conclusions about human behavior. ***State v. Petrone***, 161 Wis. 2d 530, 547-48, 468 N.W.2d 676 (1991).

credibility is not relevant to the determination of whether Butz unreasonably refused to submit to chemical testing. ***Wille***, 185 Wis. 2d at 681.

¶6 This court will uphold the trial court's findings of fact unless they are clearly erroneous. ***State v. Richardson***, 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990). Whether those facts satisfy the statutory standard of probable cause is a question of law that this court reviews de novo. ***Id.*** at 137-38. A review of the record indicates that under the totality of the circumstances and based on all of the facts available to the arresting officer at the time of the arrest, a reasonable officer would believe that Butz was driving the vehicle while intoxicated.

¶7 The trial court finding that there was reasonable suspicion to conduct a traffic stop is supported by plausible evidence. The testimony of the arresting officer was that he clocked Butz's speed at forty-one miles per hour using radar equipment. There is also testimony that the officer followed Butz and was behind her at a stop sign when she "accelerated very rapidly" away from the stop sign and the officer then paced Butz as traveling between thirty-seven and thirty-nine miles per hour.

¶8 In finding there was probable cause to arrest Butz for drunk driving, the trial court considered the officer's experience, training and "vast number of traffic drunk driving arrests."[3] The court also found that the officer observed

[3] In determining whether probable cause exists, the trial court may consider the officer's previous experience, ***State v. DeSmidt***, 155 Wis. 2d 119, 134-35, 454 N.W.2d 780 (1990), and also the inferences that the officer draws from that experience and the surrounding circumstances, ***State v. Pozo***, 198 Wis. 2d 705, 713, 544 N.W.2d 228 (Ct. App. 1995).

Butz's glassy and bloodshot eyes and her slurred speech.[4] The trial court recognized that the cold weather at the time of the stop might have affected Butz's performance on some of the field sobriety tests; therefore, the court limited its considerations to the results from the horizontal gaze nystagmus tests and the one-leg-stand test.[5] Our review of the record convinces us that there is plausible evidence supporting all of these findings.

¶9 Measuring the officer's conduct by an objective standard and using the totality of the circumstances test, a reasonable officer could conclude that there was probable cause to believe Butz was driving while under the influence of an intoxicant. Therefore, we affirm the trial court's finding that Butz's refusal to submit to chemical testing was unreasonable.

By the Court.—Order affirmed.

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

[4] An officer's observations of a suspected drunk driver are enough to establish probable cause even when field sobriety tests are not administered. ***State v. Babbitt***, 188 Wis. 2d 349, 357, 525 N.W.2d 102 (Ct. App. 1994).

[5] Because the totality of the circumstances test is used to determine probable cause for arrest, there is no requirement that field sobriety tests be administered before arrest. ***State v. Kasian***, 207 Wis. 2d 611, 621-22, 558 N.W.2d 687 (Ct. App. 1996).