COURT OF APPEALS
DECISION
DATED AND FILED

March 6, 2002

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.

Appeal No. 01-2542 **Cir. Ct. No. 01-TR-3660**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN B. YOUNG,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Walworth County: MICHAEL S. GIBBS, Judge. *Affirmed.*

¶1 ANDERSON, J.[1] John B. Young appeals from an order revoking his driving privileges for one year. Young contends that the arresting officer failed to comply with the standardized field sobriety testing requirements

[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.

established in the National Highway Transportation Safety Administration (NHTSA) training manual; therefore, the officer did not have probable cause to request Young to submit to an evidentiary test of his blood. This court concludes that there is no legal authority in Wisconsin that stands for the proposition that only the field sobriety tests approved by the NHTSA must be given or that the results must match the results described in the NHTSA manual before an arresting officer has sufficient probable cause to request a driver to submit to a chemical test of his or her blood.

¶2 Young's second contention is that his fear of needles is a reasonable basis to refuse to submit to a blood draw and the circuit court erred in holding that his refusal was unreasonable. This court concludes that an arresting officer is not required to consider a lawfully arrested driver's request for an alternative test. Absent a reasonable objection, the officer has the authority to decline to administer the alternate test requested by the driver. Because Young's objection for refusing a blood draw was not reasonable, the circuit court's order is affirmed.

¶3 Town of East Troy police officer Daniel Heidelmeier was operating stationary radar at 1:43 a.m. on July 4, 2001, when he clocked a vehicle traveling sixty-three miles per hour in a forty-five mile per hour posted speed zone. Heidelmeier pursued the vehicle, which stopped within a reasonable time. The officer approached the driver's side and identified Young as the driver. Heidelmeier asked Young where he was coming from and when Young responded that he was returning from Summerfest in Milwaukee, the officer detected a strong odor of intoxicants. In response to the inevitable question of when he had his last drink, Young answered approximately one hour earlier. After conducting a driver's license check and a vehicle registration check, Heidelmeier asked Young to step out of the car to perform field sobriety tests. At that time, the officer

noticed that Young's eyes were somewhat watery and bloodshot. The officer also noted that Young's speech was slow and slurred.

¶4 Heidelmeier administered three field sobriety tests—horizontal gaze nystagmus, walk and turn, and one-leg stand—and Young failed to perform any of the tests to the officer's standards. After Young refused to submit to a preliminary breath test, Heidelmeier arrested him for operating while under the influence of an intoxicant (OMVWI), placed him in the squad car and drove to Lakeland Medical Center in Elkhorn for a blood draw. At the hospital, the officer read the Informing the Accused form to Young and asked if he would submit to an evidentiary chemical test of his blood; Young refused. Through an offer of proof, it was established that Young refused to submit to a blood test because of unspecified "concerns with respect to needles" and offered to submit to any other chemical test.

¶5 Young timely filed a demand for a refusal hearing. Before the refusal hearing was held, he was found not guilty in a bench trial in the municipal court for East Troy. At the conclusion of testimony, the circuit court concluded that Heidelmeier properly administered the three field sobriety tests to Young and obtained results that, along with the officer's observations, amounted to probable cause to arrest Young. The court also found that it was not Young's option which chemical test he would take; therefore, the court held that his refusal was unreasonable.

¶6 Young appeals the decisions that there was probable cause to support an arrest and that his subsequent refusal to submit to a chemical test was unreasonable. Young's first attack is against the officer's administration of the field sobriety tests and the interpretation of the results of those tests. He asserts

that because the officer failed to follow the procedures and criteria for field sobriety tests contained in the NHTSA manual on standardized testing procedures, the validity of the tests is compromised and the results cannot be used to establish probable cause. Young's second attack is on the finding that his refusal to submit to the chemical evidentiary test was unreasonable. Young claims that because he offered to take any test but the blood test and his reason was a fear of needles, we should declare the refusal to be reasonable.

¶7 An officer may request a person to submit to chemical testing for blood-alcohol content upon his or her arrest for OMVWI. WIS. STAT. § 343.305(2). Young refused to consent to chemical testing after his arrest for OMVWI. Upon receiving notice of the State's intent to revoke his driver's license, he requested a refusal hearing under § 343.305(9). The only issues before the court at a refusal hearing are: "(1) whether the officer had probable cause to believe that the person was driving under the influence of alcohol [and lawfully placed the suspect under arrest]; (2) whether the officer complied with the informational provisions of § 343.305[(4)]; (3) whether the person refused to permit a blood, breath or urine test; and (4) whether the refusal to submit to the test was due to a physical inability unrelated to the person's use of alcohol." ***State v. Wille***, 185 Wis. 2d 673, 679, 518 N.W.2d 325 (Ct. App. 1994). If at least one of the issues is determined in favor of the defendant, "the court shall order that no action be taken on the operating privilege on account of the person's refusal to take the test in question." Sec. 343.305(9)(d).

¶8 Young argues that because his arrest was not supported by probable cause, he properly refused to submit to chemical blood-alcohol testing. Whether the facts of record constitute probable cause is a question of law which we review de novo. ***State v. Babbitt***, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App.

1994). In ***Babbitt***, we set forth the following test for determining probable cause for arrest at a refusal hearing:

> In determining whether probable cause exists, we must look to the totality of the circumstances to determine whether the "arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe … that the defendant was operating a motor vehicle while under the influence of an intoxicant." Probable cause to arrest does not require "proof beyond a reasonable doubt or even that guilt is more likely than not." It is sufficient that a reasonable officer would conclude, based upon the information in the officer's possession, that the "defendant probably committed [the offense]."

Id. at 356-57 (alteration in original; citations omitted). Furthermore, "[t]he State's burden of persuasion at a refusal hearing is substantially less than at a suppression hearing." ***Wille***, 185 Wis. 2d at 681. In presenting evidence at a refusal hearing to establish probable cause, the State only needs to show that the officer's account is plausible. ***Id.*** A court does not weigh evidence for and against probable cause or determine the credibility of the witnesses at a refusal hearing. ***Id.***

¶9 Young asserts that the circuit court improperly considered the testimony regarding his performance on the field sobriety tests because the tests were not properly administered, and that, absent the tests, there was no probable cause for arrest. Young claims that the arresting officer's testimony shows that the horizontal gaze nystagmus test was administered contrary to the instructions in the NHTSA manual. In addition, he claims that each of the other two tests produced at least one clue that, under the NHTSA manual, indicated a passing result.

¶10 Young's argument contains a gap in logic and it misconstrues the law in Wisconsin. Perhaps it is true that the NHTSA manual describes a three-test battery that is claimed to be highly reliable in identifying persons whose blood-alcohol concentration are over .10% when the tests are administered in a

standardized manner and assessed on the basis of standardized criteria. This does not necessarily mean, however, that the assessment of a suspect's performance must be by the standardized criteria or that all of the criteria must be present to support an assumption that the suspect's ability to operate a motor vehicle was impaired by alcohol consumption. We are unaware of any legal authority in Wisconsin for the proposition that the NHTSA described tests and assessment criteria and only those tests and assessment criteria may be relied upon by law enforcement officers in assessing probable cause to arrest for OMVWI, and Young refers us to no statutes or case law to that effect.

¶11 Actually, probable cause to arrest may exist where no field sobriety tests were given. *See, e.g.*, ***State v. Kasian***, 207 Wis. 2d 611, 621-22, 558 N.W.2d 687 (Ct. App. 1996) (concluding there was probable cause to arrest suspect injured in a one-vehicle accident where the officer noted a strong odor of intoxicants coming from the defendant and slurred speech); ***Babbitt***, 188 Wis. 2d at 357 (concluding that probable cause to arrest existed even though Babbitt refused to submit to field sobriety tests); ***Wille***, 185 Wis. 2d at 683-84 (holding that an officer had probable cause to arrest a suspect who had hit the rear of a parked car, smelled of intoxicants and stated in his hospital room that he had "to quit doing this").

¶12 Having reviewed the totality of the circumstances set forth in the record, we conclude that the facts known by the officer at the time of arrest would lead a reasonable police officer to believe that Young was probably operating a motor vehicle while under the influence of an intoxicant. ***Babbitt***, 188 Wis. 2d at 356-57. Young was caught on stationary radar traveling well in excess of the posted speed limit at approximately 1:43 a.m., which is near the time that bars close in Wisconsin. While many nonintoxicated persons also speed, an

intoxicated person is less likely to be aware of the rules of the road and more likely to violate those rules. Heidelmeier observed that Young's eyes were somewhat watery and bloodshot and his speech was slow and slurred. The officer's account of the basis for Young's arrest is plausible, and it establishes probable cause for the officer's reasonable belief that Young was operating a motor vehicle while intoxicated.

¶13 Young does make an alternative argument, assuming for the sake of argument that there was probable cause to arrest him for OMVWI; he proposes that his refusal to submit to the blood draw was reasonable. He suggests that his fear of needles, coupled with his offer to take a different test, operate to make his refusal reasonable. This court readily rejects Young's argument that his fear of needles is a reasonable objection. It is well established that reasonableness is an objective standard. *See* ***Ter Maat v. Barnett***, 156 Wis. 2d 737, 742, 457 N.W.2d 551 (Ct. App. 1990). As a practical matter, Young provides no objective basis for fearing the needles used for his blood draw. He does not dispute that his blood was drawn in a hospital under medically accepted standards. He has not identified any scientific evidence, and this court is aware of none, that he faced any statistically significant chance of harm from needles as any other patient under contemporary advances in drawing blood and laboratory hygiene. Young also fails to explain how his claimed fear of needles constitutes a reasonable objection. He does not claim that he has any medical or religious basis for his fear or objection. His bald assertion is not objectively reasonable. If this court concluded that either of Young's unsubstantiated objections was reasonable, there would be no standard for reasonable objections.

¶14 This court also rejects Young's assertion that his offer to take another chemical test makes his refusal to submit to the blood test reasonable. It is

well established in this state that the legislature has given law enforcement agencies the choice to designate which of the three chemical evidentiary tests of a driver's blood that the driver must take first. ***City of Madison v. Bardwell***, 83 Wis. 2d 891, 901, 266 N.W.2d 618 (1978). Therefore, Young's offer to take a different test was meaningless.[2]

¶15 Finally, Young looks to ***State v. Eason***, 2001 WI 98, 245 Wis. 2d 206, 629 N.W.2d 625, and urges us to "recognize heightened protections are afforded persons in this State above those recognized under the Fourth Amendment." It is not our understanding that the implied consent law was intended to give greater rights to an alleged drunken driver than he or she has been previously constitutionally afforded. ***Scales v. State***, 64 Wis. 2d 485, 493-94, 219 N.W.2d 286 (1974). Rather, the law's "purpose was to impose a condition on the right to obtain a license to drive on a Wisconsin highway." ***Id.*** at 494. "It was intended to facilitate the taking of tests for intoxication and not to inhibit the ability of the state to remove drunken drivers from the highway." ***Id.*** Considering that purpose, if public policy demands that drunken drivers should have heightened protections under article I, section 11 of the Wisconsin Constitution, the legislature or the supreme court must make that pronouncement. ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

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[2] Young insists that the state of the law in this area is in flux and points to the Wisconsin Supreme Court's acceptance of a petition for review in ***State v. Krajewski***, No. 99-3165-CR, unpublished order (WI App Dec. 5, 2000), *review granted*, 2001 WI 88, 246 Wis. 2d 165, 630 N.W.2d 219 (Wis. May 8, 2001). ***Krajewski*** is of no aid and comfort to Young because the issue there is "[w]hether the reasonableness requirement of the Fourth Amendment to the U.S. Constitution was violated when a police officer ignored a suspected drunk driver's request to take a breath test rather than a blood draw in determining the driver's blood alcohol content?" The issue here is whether Young's refusal was reasonable; Young has not raised a Fourth Amendment claim in this case.

By the Court.—Order affirmed.

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