

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 22, 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. 02-0782-CR
STATE OF WISCONSIN**

Cir. Ct. No. 00-CT-2239

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEREK L. NAFF,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
STUART A. SCHWARTZ, Judge. Affirmed.

¶1 DYKMAN, J.¹ Derek Naff appeals from his conviction for operating a motor vehicle with a prohibited alcohol concentration in violation of

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

WIS. STAT. § 346.63(1)(b). Naff contends that the trial court erroneously denied his motion to suppress evidence stemming from his arrest. He argues that the results of his Preliminary Breath Test (PBT) could not be considered in the arresting officer's probable cause determination because he did not consent to the test, and that without such results there was no probable cause to arrest. Additionally, Naff claims that the trial court erred by refusing to allow into evidence excerpts from a State manual entitled "Basic Training Program for Breath Examiner Specialist." Finally, Naff argues that the trial court improperly refused to instruct the jury on the effect of the blood alcohol curve.

¶2 We conclude that: (1) there was probable cause to arrest even absent the PBT; (2) the trial court did not erroneously exercise its discretion when it excluded the excerpts from the State manual; and (3) refusal to give the proposed jury instruction was a proper exercise of discretion because the evidence did not support the instruction.²

Background

¶3 At about 12:50 a.m. on September 5, 2000, a Cottage Grove police officer observed a car on Highway 12 & 18 cross the centerline several times, once while another car approached from the opposite direction. The officer stopped the car, and approached Derek Naff, its driver. The officer noticed that Naff exhibited a strong smell of alcohol, bloodshot glassy eyes, and slurred speech. When the officer asked Naff about the odor he said that he had consumed "a couple of drinks."

² Because we conclude that probable cause existed without considering the PBT we do not reach the issue of whether Naff consented to the PBT.

¶4 The officer asked Naff to exit the vehicle and to perform field sobriety tests. He first conducted the Horizontal Gaze Nystagmus (HGN) test. Naff failed, exhibiting six out of six clues of intoxication. Next, the officer had Naff do the walk and turn test. The officer testified that Naff stumbled, lost his balance and used his arms to balance. Naff was then asked to perform the one-legged-stand test, but was unable to complete it. Naff told the officer that he had lower back problems that prevented him from finishing the test. The final test the officer administered was the finger dexterity test, which Naff failed.

¶5 The officer then administered the PBT. Naff registered .13. The officer placed Naff under arrest and charged him with operating a motor vehicle while under the influence of an intoxicant, in violation of WIS. STAT. § 346.63(1)(a), and operating a motor vehicle while having a prohibited alcohol concentration, in violation of WIS. STAT. § 346.63(1)(b).

¶6 Naff moved to suppress evidence and statements obtained as the result of an unlawful seizure, detention and arrest. The trial court denied the motion.

¶7 At trial, Naff attempted to introduce an exhibit containing excerpts from a State manual entitled “Basic Training Program for Breath Examiner Specialist.” The trial court excluded the exhibit because it would confuse the jury. The trial court also denied Naff’s request for a jury instruction regarding the blood alcohol curve. The jury found Naff guilty of operating with a prohibited alcohol concentration, but not guilty of driving under the influence of an intoxicant. Naff appeals.

Analysis

1. Probable Cause to Arrest

¶8 Naff argues that the results of the PBT cannot be used in a probable cause determination because he did not consent to the administration of the test. He contends that without the PBT evidence, the officer did not have probable cause to arrest him. Therefore, the trial court erred by denying his suppression motion. We conclude, however, that even without the PBT, the officer had probable cause to arrest Naff.

¶9 When evaluating a trial court's decision regarding a suppression motion, we uphold the trial court's findings of fact unless they are clearly erroneous. *State v. Roberts*, 196 Wis. 2d 445, 452, 538 N.W.2d 825 (Ct. App. 1995). But the question of whether a given set of facts 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). We are therefore not bound by the trial court's implicit determination that without the PBT the officer did not have probable cause to arrest Naff.

¶10 To determine if facts are sufficient to support a finding of probable cause we must consider whether "the totality of the circumstances within 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." *State v. Nordness*, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986). While there must be more than a possibility or suspicion that the defendant committed the crime, it is not necessary to show that guilt is more probable than not. *State v. Mitchell*, 167 Wis. 2d 672, 681-82, 482 N.W.2d 364 (1992).

¶11 Even absent the PBT results, probable cause existed in this case. In *State v. Swanson*, 164 Wis. 2d 437, 453-54 n.6, 475 N.W.2d 148 (1991), the supreme court found that probable cause was not satisfied where there were no field sobriety tests and the only indicia of intoxication were erratic driving, odor of alcohol, and the fact the arrest occurred at 2:00 a.m. Naff's case is distinguishable because, without considering the PBT, there are more indicia of intoxication *and* the officer performed field sobriety testing. Naff was driving erratically, crossing the centerline on several occasions, including once while a car approached from the opposite direction. His eyes were glassy, his speech was slurred, and the officer noticed the odor of alcohol on him. Naff admitted he had been drinking. Naff deficiently performed several of the field sobriety tests. He exhibited six of six clues of intoxication during the HGN test, failed the finger dexterity test, and exhibited at least two clues during the walk and turn test.³ The facts in this case are more compelling than those that were rejected by the *Swanson* court.

¶12 The present case is comparable to *State v. Babbitt*, 188 Wis. 2d 349, 525 N.W.2d 102 (Ct. App. 1994), a case where we found that probable cause existed absent a PBT. In *Babbitt* the officer received a citizen's report that a truck was driving erratically, observed the defendant's vehicle, which was consistent with the citizen's description, cross the centerline three times and the eastbound dividing line once in a quarter mile stretch, detected the odor of alcohol emanating from the defendant's car, and saw that the defendant's eyes were bloodshot and glassy. *Id.* at 357. The officer also noticed that the defendant's walk to the rear of the car was deliberate and slow. *Id.* Further, the defendant was consistently

³ The trial court discounted the one-legged-stand test because Naff's back problems could have explained his performance. We also do not consider the test in our analysis.

uncooperative with the officer's requests. *Id.* The facts in the present case, as we have summarized above, are similar to those found to be sufficient in *Babbitt*. While Naff was cooperative, he did exhibit a clue of intoxication, slurred speech, which was not considered in the *Babbitt* court's analysis. *Id.* at 357-58 n.3. Further, while the officer in *Babbitt* observed the defendant walking slowly and deliberately, he did not perform the field sobriety tests that were conducted in the present case. *Id.* at 357. Considering Naff's performance during the field sobriety testing, the facts in his case present at least as strong an argument for probable cause as those found to be sufficient in *Babbitt*.

¶13 Naff does not consider *Swanson* or *Babbitt*. Instead, he argues that *County of Jefferson v. Renz*, 231 Wis. 2d 293, 603 N.W.2d 541 (1999), instructs that without the PBT, probable cause is not present. We disagree. In *Renz*, the supreme court only considered whether the facts were sufficient to meet the lower statutory probable cause standard required before an officer can request a PBT. *Id.* at 316. The *Renz* court did not consider whether there was probable cause to arrest. However, even assuming that *Renz* implies that under its facts probable cause to arrest did not exist absent the PBT, it does not follow that *Renz* controls here. In *Renz* there were fewer indicia of intoxication. Unlike in Naff's case, there was no erratic driving and there was no slurred speech. *Id.* at 316-17. In *Renz*, though the defendant exhibited some clues of intoxication during field sobriety testing, the supreme court noted the defendant "was able to substantially complete all of the tests." *Id.* Finally, in *Renz* the supreme court reached its determination without considering the results of a HGN test, a test that Naff failed completely. *Id.* at 317 n.15.

¶14 We conclude, that even without considering the PBT, there is sufficient evidence to support a finding of probable cause to arrest.

2. *Exclusion of State Manual Excerpts*

¶15 Naff's next argues that the trial court erred when it excluded Exhibit 6, excerpts from a State manual entitled "Basic Training Program for Breath Examiner Specialist." While the parties characterize the court's action as excluding the evidence on relevancy grounds, we believe that the court excluded the evidence because it would mislead or confuse the jury and we analyze its decision accordingly.

¶16 Even relevant evidence may be excluded if its probative value is substantially outweighed by the risk of unfair prejudice, confusion of the issues, misleading of the jury or other considerations. WIS. STAT. § 904.03. This is an evidentiary determination that is in the trial court's "broad discretion." *Nowatske v. Osterloh*, 201 Wis. 2d 497, 503, 549 N.W.2d 256 (Ct. App. 1996). This determination will be upheld unless it constitutes an erroneous exercise of discretion. *State v. Oberlander*, 149 Wis. 2d 132, 142, 438 N.W.2d 580 (1989). We will not find an erroneous exercise if there is a reasonable basis for the trial court's determination. *State v. Alsteen*, 108 Wis. 2d 723, 727, 324 N.W.2d 426 (1982).

¶17 Naff argues that *Sullivan v. Waukesha*, 218 Wis. 2d 458, 578 N.W.2d 596 (1998), is dispositive on this issue. We disagree. While *Sullivan* deals with the same manual that Naff attempted to admit, the issue in *Sullivan* was whether the trial court erroneously exercised its discretion when it determined that the manual was inadmissible hearsay. *Id.* at 472. *Sullivan* did not consider whether it would have been proper to exclude the manual under WIS. STAT. § 904.03.

¶18 The trial court had a reasonable basis for its determination and therefore did not erroneously exercise its discretion. While portions of Exhibit 6 contain general information regarding the manner in which the body absorbs, eliminates and distributes alcohol, other parts of the exhibit contain a more detailed discussion outlining how to estimate the rate at which a particular person will absorb and eliminate alcohol. Exhibit 6 also contains a formula that a reader can use to estimate an individual's blood alcohol concentration. In order to make these estimates it is necessary to have information such as the individual's weight, physical condition, the amount of alcohol consumed, and the quantity of food the individual ingested with the alcohol. The trial court ruled that the jury would have been confused because it did not have enough information about Naff to apply the analysis and formulas contained in the excerpts.

¶19 Even if we were to accept Naff's contention that the Alcohol Influence Report supplied admissible information about the amount of alcohol Naff consumed, we would still conclude that the trial court's decision was reasonable. The record is totally devoid of important information such as Naff's weight and the amount of food he consumed. The manual itself emphasizes the importance of such information, in one instance noting, "*The most significant factor affecting alcohol absorption is the quantity of food ingested with or immediately prior to consumption of alcohol.*" Exhibit 6 at D-7. Without the necessary information the jury would have been left to speculate in order to apply Exhibit 6. We conclude that exclusion of the exhibit on the grounds it would confuse the jury was a proper exercise of discretion because the trial court had a reasonable basis to believe that the exhibit's probative value was substantially outweighed by the risk of jury confusion.

3. Refusal to Give Requested Jury instruction.

¶20 Naff’s final argument is that the trial court erred by refusing to give a blood alcohol curve instruction consistent with WIS JI—CRIMINAL 234.

¶21 A trial court has wide discretion in issuing jury instructions based on the facts and circumstances of the case. *State v. Turner*, 114 Wis. 2d 544, 551, 339 N.W.2d 134 (Ct. App. 1983). “A trial court should exercise discretion in order to fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence.” *Id.* The appropriateness of giving a particular instruction should turn on a case-by-case review of the evidence. *Id.*

¶22 At trial, the court determined that the blood alcohol curve instruction should not be given because the evidence did not support it. We conclude that this was a proper exercise of discretion.

¶23 WISCONSIN JI—CRIMINAL 234 indicates, “Evidence has also been received as to how the body absorbs and eliminates alcohol.” The record shows that there was only minimal testimony concerning this subject. This testimony only noted the basic principal that alcohol does not immediately enter the bloodstream and that once it does the body starts to eliminate it. The testimony did not give any indication of the rates at which absorption or elimination occur, or what factors may affect those rates. Without such information, the jury would not have been able to apply the basic principal to the facts of the case in a meaningful manner. They could only have guessed as to how quickly the alcohol would have entered and left Naff’s bloodstream. Therefore, we conclude that the

court properly exercised its discretion in determining that the evidence did not support the proposed instruction.⁴

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.

⁴ Because Exhibit 6 was properly excluded, the information contained in Exhibit 6 is not considered in our determination of whether the evidence supported giving the proposed jury instruction.

