**COURT OF APPEALS DECISION DATED AND FILED**

**July 30, 2003**

**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. 03-0670-FT**

**Cir. Ct. No. 02-TR-011208**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS**
**DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DENNIS G. VALSTAD,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Fond du Lac County: STEVEN W. WEINKE, Judge. *Affirmed*.

¶1 NETTESHEIM, P.J.[1] Dennis G. Valstad appeals from a circuit court order finding his refusal to submit to chemical testing pursuant to WIS.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version.

STAT. § 343.305 improper and revoking his operating privileges for one year.[2] Valstad argues that his refusal was proper because the officer did not have probable cause to administer a preliminary breath test (PBT). We reject Valstad's challenge and affirm the order.

¶2 At the refusal hearing, the arresting officer, Sergeant John T. Teachout of the City of Ripon Police Department, testified to the events leading to Valstad's arrest. Teachout testified that he was dispatched to the Piggly Wiggly parking lot at 5:30 p.m. to take a traffic collision report. At the scene, Teachout spoke with both Valstad and the driver of the other vehicle involved in the collision. Valstad told Teachout that he was backing out of a parking lot stall when he collided with another vehicle that was exiting the parking lot. Valstad told Teachout that he "tried to stop, but couldn't stop in time." Teachout observed that the physical damage to the vehicles was consistent with both drivers' accounts of the incident.

¶3 While Teachout was speaking with Valstad, he noted an odor of intoxicants on Valstad's breath and that Valstad's eyes were bloodshot and his speech was slurred. Teachout asked Valstad if he had been drinking and Valstad replied that he had "just had a few" at a bar in Ripon and had stopped by the store

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[2] The circuit court's oral bench ruling found that Valstad had "improperly refused" testing under the implied consent law. However, the circuit court's written order (presumably prepared by one of the parties) finds Valstad's refusal to be "unreasonable." The court's language in its bench decision was the correct terminology. While "reasonableness" was once the test for measuring the validity of a refusal, that is no longer the test. Under current law, the test is whether a refusal is proper. *See* WIS. STAT. § 967.055(2)(a) (referring to an "improper refusal"). A refusal is proper if probable cause did not support the arrest, the suspect was not properly advised under the implied consent law, or the suspect refused the test due to a physical inability to submit to the test. *See* WIS. STAT. § 343.305(9)(a)5.a, b, c.

to pick up dinner. Teachout then asked Valstad to perform field sobriety testing and Valstad agreed.

¶4 Teachout first had Valstad recite the alphabet. Valstad recited the alphabet correctly but his speech was slurred. Teachout determined that Valstad passed that test. Teachout next administered the finger-to-nose test and observed that Valstad failed to follow the directions given to him, wavered from side-to-side, and failed to properly complete the test by touching the side rather than the tip of his nose. In Teachout's opinion, Valstad failed the finger-to-nose test. Teachout also determined that Valstad failed the next test, the heel-to-toe test. Again Teachout observed that Valstad failed to follow directions and failed to maintain control of his balance. Teachout then asked and Valstad agreed to submit to a preliminary breath test, which produced a result of .17. Based on the totality of this information, Teachout determined that Valstad was under the influence of intoxicants or drugs and arrested him. Teachout then informed Valstad under the implied consent law and requested that he submit to chemical testing. Valstad refused and this refusal proceeding ensued.

¶5 At the close of the evidence, the circuit court found that Teachout had probable cause to arrest Valstad, that Teachout had properly informed Valstad under the implied consent law, and that Valstad had improperly refused to take a chemical test of his blood, breath or urine. Valstad appeals from the ensuing written order.

¶6 The issues at a refusal hearing are: (1) whether the officer had probable cause to believe that the person was driving while under the influence of alcohol; (2) whether the officer complied with the informational provisions of WIS. STAT. § 343.305(3)(a); (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. Nordness***, 128 Wis. 2d 15, 28, 381 N.W.2d 300 (1986). Valstad's appeal is targeted at the probable cause component of this test. However, he puts a finer point on the issue. He notes that WIS. STAT. § 343.303 provides that a law enforcement officer may request an OWI suspect to submit to a PBT if the officer has "probable cause to believe that the person is violating or has violated s. 346.63(1) or (2m) or a local ordinance in conformity therewith." Valstad argues that Teachout did not have probable cause to request that he submit to the PBT.

¶7 We begin by noting a preliminary matter which causes us to wonder if Valdstad's appellate argument is properly before us. At the opening of the refusal hearing, Valstad stated that he was challenging only the probable cause component of a refusal hearing. However, Valstad did not put the finer point on the issue that he raises on appeal, namely, that probable cause did not exist to support Teachout's request that he submit to the PBT. It thus appears that Valstad's probable cause challenge in the trial court was a generic claim that all of the evidence known to Teachout, *including the PBT result*, did not constitute probable cause to arrest for OWI. Therefore, we question whether the issue Valstad raises on appeal was actually the issue litigated in the trial court.

¶8 However, the State does not make this potential waiver argument. Instead, the State addresses Valstad's appellate argument on the merits. We will do likewise.

¶9 We review probable cause under a de novo standard of review. ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 316, 603 N.W.2d 541 (1999). The test of probable cause under the refusal hearing statute is greater than the

reasonable suspicion necessary to justify an investigative stop but less than the level of proof required to establish probable cause for arrest. ***Id***. at 314. "The State's burden of persuasion at a refusal hearing is substantially less than at a suppression hearing." ***State v. Wille***, 185 Wis. 2d 673, 681, 518 N.W.2d 325 (Ct. App. 1994). At the refusal hearing, all the State must establish is that the arresting officer had probable cause to believe the person was driving or operating a motor vehicle while under the influence of an intoxicant. ***Nordness***, 128 Wis. 2d at 35. The State need only show that the arresting officer's account is plausible, and the court will not weigh the evidence for and against probable cause or determine the credibility of the witnesses. *See* ***id***. at 36. "Indeed, the court need not even believe the officer's account. It need only be persuaded that the State's account is plausible." ***Wille***, 185 Wis. 2d at 681.

¶10 The ***Nordness*** court explains the limited nature of a refusal hearing:

> We view the [refusal] 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 [refusal] 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 (citation omitted).

¶11 As noted, WIS. STAT. § 343.303 allows a police officer to request an OWI suspect to submit to a PBT if the officer has "probable cause." Valstad argues that information known to Teachout prior to his request that Valstad submit to the PBT did not establish probable cause under this statute. Valstad challenges Teachout's use of the finger-to-nose test, which he argues has not been approved

by the National Highway Traffic Safety Administration as a field sobriety test. However, the finger-to-nose test has been accepted by the courts of this state for decades. In ***Renz***, the supreme court noted the officer's use of the test in that case while recognizing that it "was not from the manual, but the officer had learned it in his recruit class and through training at the sheriff's department." ***Renz***, 231 Wis. 2d at 298. Like Valstad, the defendant in ***Renz*** touched the bridge of his nose instead of the tip of his nose. ***Id***.

¶12 Valstad also argues that Teachout "mis-administered" the heel-to-toe test because Teachout could not recall whether he provided Valstad with a straight line to walk parallel to. While Valstad's challenges to the reliability of the tests may affect the weight given those tests by the fact finder at trial, the refusal hearing is not a forum in which to weigh evidence. *See* ***Nordness***, 128 Wis. 2d at 36. Rather, the circuit court's role is limited to ascertaining the plausibility of the officer's account. ***Id***.

¶13 Here, Teachout had been called to the accident scene and made contact with Valstad, who indicated that the accident occurred when he "tried to stop, but couldn't stop in time." In speaking with Valstad, Teachout observed that Valstad had an odor of intoxicants, bloodshot eyes and slurred speech. Teachout then noted several "clues" indicating intoxication when he administered field sobriety testing. Contrary to Valstad's contention on appeal, we conclude that the totality of the facts and circumstances known to Teachout at the time of Valstad's arrest constitutes sufficient probable cause to support not only the administration of a PBT but also to support the determination made by the trial court—that Teachout reasonably believed that Valstad had operated a motor vehicle while intoxicated. *See* ***County of Dane v. Sharpee***, 154 Wis. 2d 515, 518, 453 N.W.2d

508 (Ct. App. 1990) (courts will look to the totality of the facts and circumstances in determining whether probable cause to arrest exists).

¶14 As a final matter, we observe that this case presents the very kind of situation for which the PBT was intended because it aided Teachout in determining whether probable cause to arrest existed. The PBT's place in the process of an OWI investigation was discussed by the supreme court in ***Renz***, 231 Wis. 2d at 310-11. First, an officer may make an investigative stop pursuant to WIS. STAT. § 968.24 if the officer "reasonably suspects" that a person has committed or is about to commit a crime or reasonably suspects that a person is violating the noncriminal traffic laws. ***Renz***, 231 Wis. 2d at 310. After stopping the vehicle and contacting the driver, the officer's observations may cause the officer to suspect the driver of operating the vehicle while intoxicated. ***Id***. If the observations of the driver are not sufficient to establish probable cause for arrest for an OWI violation, the officer may request the driver to perform various field sobriety tests. ***Id***. However, the driver's performance on these tests may not produce enough evidence to establish probable cause for arrest. "The legislature has authorized the use of the PBT to assist an officer in such circumstances…. For non-commercial drivers, the officer may request a PBT if there is 'probable cause to believe' that the person has been violating the OWI laws. If the driver consents to the PBT, the result can assist the officer in determining whether there is probable cause for the arrest." ***Id***. at 310-16 (citations omitted). If under the facts there are reasonable grounds to believe that the person has violated the OWI laws, the officer may arrest the driver under WIS. STAT. § 345.22 or WIS. STAT. § 968.07(1)(d). ***Renz***, 231 Wis. 2d at 310. Teachout's use of the PBT in this case is consistent with its intended purposes and the result of .17 further supported the trial court's finding of probable cause.

¶15 We conclude that Teachout had probable cause to request Valstad to submit to a PBT and probable cause to believe that Valstad was operating a motor vehicle while intoxicated. We therefore uphold the circuit court order finding Valstad's refusal improper and revoking his driving privileges.

*By the Court.*—Order affirmed.

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