

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 10, 2005

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. 04-1919
STATE OF WISCONSIN**

**Cir. Ct. Nos. 04TR000682
04TR000683**

**IN COURT OF APPEALS
DISTRICT IV**

**COUNTY OF JEFFERSON,

PLAINTIFF-RESPONDENT,

V.

DALE W. PROUT,

DEFENDANT-APPELLANT.**

APPEAL from a judgment of the circuit court for Jefferson County:
RANDY R. KOSCHNICK, Judge. *Affirmed.*

¶1 HIGGINBOTHAM, J.¹ Dale W. Prout appeals a judgment of conviction for operating a motor vehicle while intoxicated, first offense, after the

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

trial court denied his motion to suppress. Prout argues the Jefferson County Deputy Sheriff did not have probable cause to require Prout to submit to a preliminary breath test (PBT). Prout further argues that because there was no probable cause to administer the PBT, he was illegally arrested for OWI. We disagree with both these contentions and affirm the judgment of conviction.

FACTS

¶2 The following facts were established at the suppression motion hearing. On January 10, 2004, Jefferson County Deputy Sheriff Michael Zenoni was on routine patrol when he was dispatched to a one-vehicle traffic crash on Highway 26 near Turf Road. The Jefferson County Sheriff's Department Dispatch Center advised Zenoni the victim of the car accident was in the emergency room (ER) at Watertown Hospital. Zenoni went to the scene of the accident and observed a vehicle had left the roadway and rolled over in the ditch on the side of the road.

¶3 The evidence at the scene suggested the vehicle was southbound on Highway 26 when it traveled on the westside gravel shoulder of the road; the driver had apparently been driving erratically, crossed both lanes of Highway 26, entered the eastside ditch line and rolled over. The vehicle was unoccupied and there were no witnesses at the scene. The road was dry and the weather was clear. Zenoni did not observe the odor of alcohol or any containers of intoxicants in the vehicle.

¶4 Zenoni proceeded to Watertown Hospital and spoke with ER personnel. Hospital personnel informed him the person involved in the accident, Prout, had a broken neck and was in the process of having a CAT scan. In

addition, ER staff indicated they detected an odor of alcohol around Prout, although the police report made no mention of this fact.

¶5 Zenoni then spoke with Prout's girlfriend, Kim Lutz, who informed Zenoni Prout had arrived at her residence around 2:00 a.m. that day and had left around 6:00 a.m. Lutz indicated a neighbor came to her door shortly after Prout left and informed her Prout had been injured in an accident and that he was taking Prout to the hospital.

¶6 Zenoni next spoke with Prout while he was in the ER. Prout indicated he had left his girlfriend's apartment and was heading home on Highway 26 when he swerved to avoid a deer and lost control of his truck. Prout informed Zenoni his vehicle struck the ditch, rolled over and he was ejected out the driver's window. Prout said a neighbor came by shortly thereafter and gave him a ride to his girlfriend's apartment and then to the hospital. Although initially Zenoni did not smell intoxicants on Prout, he later detected a slight odor of intoxicants on him when Prout was removed to a treatment room. Zenoni declined to ask Prout to perform any field sobriety tests based upon the severity of his injuries. Zenoni did not ask Prout whether he had been drinking until after Zenoni administered the PBT to Prout.

¶7 Based upon the above information, Zenoni asked Prout to submit to a preliminary breath test; Prout agreed and the result indicated a .09% blood alcohol concentration. Zenoni placed Prout under arrest for OWI and read him the Informing the Accused form. Prout then consented to a blood draw which was performed by ER staff.

¶8 Prout was ultimately charged with OWI, first offense, and operating with a prohibited blood alcohol concentration, first offense. After pleading not

guilty to the charges, Prout filed a motion to suppress all chemical test results. After a May 10, 2004 hearing, this motion was denied. After a court trial on stipulated facts, Prout was found guilty of both violations. A judgment of conviction for the OWI charge was entered on June 3, 2004. Prout appeals.

DISCUSSION

¶9 When reviewing a trial court's ruling on a motion to suppress, we uphold the trial court's findings of fact unless they are clearly erroneous. *State v. Eckert*, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996). However, the application of constitutional and statutory principles to these facts is a question of law we review de novo. *State v. Krier*, 165 Wis. 2d 673, 676, 478 N.W.2d 63 (Ct. App. 1991).

¶10 Prout makes two arguments, the second of which is contingent upon success of the first. We therefore only address the first argument. Prout argues Zenoni did not have the degree of probable cause required by WIS. STAT. § 343.303 and *County of Jefferson v. Renz*, 231 Wis. 2d 293, 603 N.W.2d 541 (1999), to support his request to administer a PBT. We conclude, under the facts of this case, Zenoni had probable cause to administer the PBT to Prout.

¶11 WISCONSIN STAT. § 343.303 addresses preliminary breath screening tests and states in relevant part:

If a law enforcement 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, or s. 346.63(2) or (6) or 940.25 or s. 940.09 where the offense involved the use of a vehicle, or if the officer detects any presence of alcohol, a controlled substance, controlled substance analog or other drug, or a combination thereof, on a person driving or operating or on duty time with respect to a commercial motor vehicle or has reason to believe that the person is violating or has violated s.

346.63(7) or a local ordinance in conformity therewith, the officer, prior to an arrest, may request the person to provide a sample of his or her breath for a preliminary breath screening test using a device approved by the department for this purpose....

Probable cause to administer a preliminary breath test was defined in *Renz* as that “quantum of proof 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 316. The standard of probable cause varies at the different stages of the criminal process. *Id.* at 309-10. PBTs were intended by the legislature to be used as a preliminary screening tool to determine if there is probable cause for an arrest. *Id.* at 313. Thus, the standard for probable cause required to request a PBT is more easily met than the standard for probable cause required to arrest. *Id.*

¶12 As earlier indicated, we conclude Zenoni had probable cause to request a PBT from Prout. Prout was involved in a one-vehicle crash where the driver and vehicle veered onto the shoulder of the road, lost control, crossed the roadway entirely, hit a ditch and rolled over. Zenoni testified at the suppression hearing that, based on his view of the accident scene, Prout was driving erratically. At the hospital, Zenoni spoke with ER personnel who indicated they had noticed an odor of intoxicants around Prout. While speaking with Prout in the small treatment room, Zenoni noted a slight odor of intoxicants surrounding Prout. All these facts combine to sustain probable cause for a PBT request.

¶13 Prout argues he explained to Zenoni the reason for the erratic driving was to avoid hitting a deer crossing the road. However, officers are not required to rule out plausibly innocent explanations. See *State v. Waldner*, 206 Wis. 2d 51, 60, 556 N.W.2d 681 (1996).

¶14 Because we reject Prout's first argument regarding the propriety of the PBT request, we will not address his second argument. We affirm the denial of Prout's suppression motion and the judgment of conviction.

By the Court.—Judgment affirmed.

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

