COURT OF APPEALS
DECISION
DATED AND FILED

November 14, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1266 **Cir. Ct. No. 2011CV1663**

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

VILLAGE OF LITTLE CHUTE,

PLAINTIFF-APPELLANT,

V.

JOHN D. BUNNELL,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Outagamie County: JOHN A. DES JARDINS, Judge. *Reversed and cause remanded with directions.*

¶1 HOOVER, P.J.[1] This appeal arises from an operating while intoxicated arrest and prosecution. The Village of Little Chute appeals a finding

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

that John Bunnell's refusal to submit to a chemical test was reasonable and a judgment of dismissal and acquittal for an operating while intoxicated citation. The Village argues the circuit court erred by finding the refusal reasonable because Bunnell improperly refused to submit to a chemical test of his blood. It also asserts the circuit court erred by preventing the Village from relying on the refusal as evidence of impairment and by holding a joint hearing on the refusal and operating while intoxicated citation.

¶2 We conclude Bunnell improperly refused to submit to a chemical test of his blood. We therefore reverse the circuit court's judgment of dismissal and direct the court to revoke Bunnell's operating privileges pursuant to WIS. STAT. § 343.305(9) and (10). We also conclude the court erred by preventing the Village from relying on the improper refusal as evidence of Bunnell's intoxication. Because Bunnell has not argued this error was harmless, we reverse and remand for a new trial on the OWI citation. Finally, because the Village did not object to the joint hearing in the circuit court, we will not consider this argument.

BACKGROUND

¶3 The Village cited Bunnell for OWI and for refusing to submit to a chemical test of his blood. A municipal court determined that Bunnell improperly refused the chemical test and that he operated while intoxicated. Bunnell requested de novo review in the circuit court and demanded a six-person jury trial for his OWI citation.

¶4 The circuit court scheduled the refusal hearing and OWI jury trial for the same day and time. On the morning of trial, the Village requested that the court make its refusal determination at the close of evidence. The Village explained that, if the court determined Bunnell improperly refused the chemical

test, it wanted to argue the improper refusal was evidence of guilt. The court agreed to make its refusal determination at the close of evidence.

¶5 At trial, officer Brady Boucher testified that, at approximately 11:45 p.m., he was on patrol and observed a vehicle traveling without its headlamps illuminated. As the vehicle turned left at an intersection, it "pulled out quickly in front of another vehicle." Boucher stopped the vehicle.

¶6 When Boucher made contact with the driver, subsequently identified as Bunnell, Boucher noticed Bunnell smelled of intoxicants. Boucher also observed Bunnell's eyes were glassy, but not bloodshot, and his speech was slow, but not slurred. When asked whether he had been consuming alcohol, Bunnell responded affirmatively.

¶7 Boucher asked Bunnell to exit his vehicle and walk to the rear of the vehicle to perform field sobriety tests. Bunnell exited the vehicle without difficulty and, although Bunnell "kind of lean[ed] against his vehicle" as he walked to the rear, he appeared steady on his feet.

¶8 Boucher first administered the horizontal gaze nystagmus ("HGN") test. On direct examination, Boucher testified that he observed all six clues of impairment while administering the test. However, on cross-examination, Boucher conceded that, at the municipal trial, it was established that he did not administer the HGN test in accordance with the procedures prescribed by the National Highway Traffic Safety Administration ("NHTSA"). NHTSA provides each pass of the eye in the HGN test must take four seconds, and Boucher used a two-second pass. As a result, the validity of the HGN test results was compromised.

¶9 After Boucher administered the HGN test, Bunnell refused to participate in other field sobriety tests. Boucher arrested Bunnell for OWI. Boucher then read Bunnell the Informing the Accused form and asked Bunnell to submit to an evidentiary chemical test of his blood. Bunnell refused.

¶10 At the close of evidence and outside the presence of the jury, the court addressed Bunnell's refusal. The court first determined Boucher read Bunnell the Informing the Accused form and Bunnell refused to take the test. As a result, the court noted the refusal centered on whether it was "plausible that the officer had probable cause to … arrest" Bunnell for OWI. The court determined it could not rely on Boucher's observations from the HGN test because Boucher failed to follow the standard procedure. As for other indications of impairment, the court noted that, prior to the arrest, Boucher observed Bunnell's glassy eyes, slow speech, odor of intoxicants, and "very limited" bad driving. Bunnell also refused to participate in the remaining field sobriety tests.

¶11 Ultimately, the court determined it needed additional time to consider whether Boucher had probable cause to arrest Bunnell and therefore whether Bunnell's refusal was improper. As a result, the court ruled that the parties would be unable to discuss Bunnell's refusal in their closing arguments. The court also overruled the Village's objection to the court's determination to not give the refusal jury instruction, reasoning the instruction was inappropriate because the court had not yet determined whether the refusal was improper.

¶12 The jury subsequently acquitted Bunnell of OWI. After excusing the jury, the court stated:

> I've been thinking a lot about [the refusal] and … the Court was concerned about the HGN and it would not consider that. There was no PBT. It could have been helpful ….

> [T]here are some inferences that can be drawn from his refusal, but in addition to that, we really don't have any bad driving here. The reason for the stop was suspiciously pulling out. But there was no indication how serious the pulling out was to interfere with the other car. And the headlights …. [A]nd now with the benefit of the jury's finding, but that is not the issue here either. And, you know, if we would have had the HGN, I clearly would find in favor of the Village for the refusal, but I'm going to find that the refusal was reasonable under the circumstances, given the limited facts. So the refusal will be dismissed.

DISCUSSION

I. Refusal determination

¶13 The Village first argues the circuit court erred by determining Bunnell properly refused to submit to a chemical test of his blood. WISCONSIN STAT. § 343.305(2), known as the implied consent law, provides that any person who drives on the public highways of the state is deemed to have consented to chemical testing upon request by a law enforcement officer. An officer may request a chemical test of a person's blood, breath, or urine after the person is arrested for violating an OWI-related statute. WIS. STAT. § 343.305(3). At the time of the request for a sample, the officer must read to the person certain information set forth in § 343.305(4), referred to as the Informing the Accused form.

¶14 If the person refuses to submit to chemical testing, he or she is informed of the State's intent to immediately revoke his or her operating privileges. WIS. STAT. § 343.305(9)(a). The person is also informed that he or she may request a refusal hearing in court. WIS. STAT. § 343.305(9)(a)4. At the refusal hearing, the issues a defendant may raise are limited to those set forth in § 343.305(9)(a)5.:

> a. Whether the officer had probable cause to believe the person was driving or operating a motor vehicle while under the influence of alcohol … and whether the person was lawfully placed under arrest for violation of [an OWI-related statue].
>
> b. Whether the officer complied with sub. (4) [by reading the Informing the Accused form to the person].
>
> 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 … unrelated to the use of alcohol, controlled substances, controlled substance analogs or other drugs.

¶15 If all of the issues are determined adversely to the person, the court will revoke the person's operating privileges. WIS. STAT. § 343.305(9)(d). However, "[i]f one or more of the issues is determined favorably to the person, 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." ***Id.***

¶16 In this case, the circuit court determined Boucher read Bunnell the Informing the Accused form and Bunnell refused to submit to a chemical test of his blood. *See* WIS. STAT. § 343.305(9)(a)5.b.-c. The circuit court dismissed the refusal against Bunnell because it determined Boucher lacked probable cause to arrest Bunnell for OWI. *See* WIS. STAT. § 343.305(9)(a)5.a. On appeal, the Village argues Boucher had probable cause to arrest Bunnell for OWI.

¶17 "There is probable cause to arrest 'when the totality of the circumstances within that officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a crime.'" ***State v. Sykes***, 2005 WI 48, ¶18, 279 Wis. 2d 742, 695 N.W.2d 277 (citation omitted). "The objective facts before the police officer need only lead to the conclusion that guilt is more than a possibility." ***Id.*** Whether the officer had

probable cause to arrest is a question of constitutional fact. ***State v. Secrist***, 224 Wis. 2d 201, 208, 589 N.W.2d 387 (1999). We accept the circuit court's factual determinations unless clearly erroneous, but application of those facts to constitutional principles is a question of law that we review without deference to the circuit court. ***Id.*** at 207-08.

¶18 The government's burden of proof 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). The government need only persuade the circuit court that the officer's account is "plausible." ***State v. Nordness***, 128 Wis. 2d 15, 36, 381 N.W.2d 300 (1986). By contrast, at a suppression hearing on an OWI charge, the government is required to present evidence sufficient to establish that probable cause existed to a "reasonable certainty." ***Id.***

¶19 The Village argues the circuit court erred in its probable cause determination, in part, because it improperly discounted Boucher's observations from the HGN test. It asserts Boucher administered the test correctly and, even if he did not, his HGN observations should be considered in the probable cause determination. We disagree. The circuit court, as finder of fact, determined Boucher did not follow the standardized procedure when administering the test. As Boucher testified, failure to follow the standardized procedure compromises the validity of the test results. If the test results were not valid, they cannot be used to support a determination of probable cause to arrest. The circuit court did not err by refusing to consider Boucher's HGN observations.

¶20 However, even without the HGN observations, we agree with the Village that, based on Boucher's other observations, Boucher had probable cause to arrest Bunnell for OWI. At the moment Boucher arrested Bunnell, Boucher

knew Bunnell had been driving at 11:45 p.m. without his headlamps illuminated and had observed Bunnell pull out in front of another vehicle while making a turn. It is dangerous to drive at night without headlamps illuminated and to pull out in front of an oncoming vehicle. *See* ***State v. Rutzinski***, 2001 WI 22, ¶34, 241 Wis. 2d 729, 623 N.W.2d 516 (observations of dangerous driving can lead to inference that individual is operating while intoxicated). Further, Bunnell smelled of intoxicants, he admitted he had been drinking, and his eyes were glassy. Bunnell also refused to participate in the remaining field sobriety tests.[2] *See* ***State v. Babbitt***, 188 Wis. 2d 349, 363, 525 N.W.2d 102 (Ct. App. 1994) (refusal to participate in field sobriety tests can be used to support probable cause to arrest). Based on Bunnell's dangerous driving, glassy eyes, odor of intoxicants, admission he had been drinking, and refusal to participate in the remaining field sobriety tests,[3] Boucher had probable cause to arrest Bunnell for OWI.

¶21 Because Boucher had probable cause to arrest Bunnell for OWI and because the circuit court determined Boucher read Bunnell the Informing the Accused form and Bunnell refused to submit to a chemical test, Bunnell's refusal was improper. We therefore reverse the circuit court's judgment of dismissal and

[2] Bunnell, in his brief, asserts he did not refuse to participate in the remaining field sobriety tests. He contends Boucher gave him the *choice* of whether he wanted to complete the tests and he declined. We reject Bunnell's characterization of the evidence. The circuit court explicitly found Bunnell "refused to do other field sobriety tests."

[3] We reject Bunnell's suggestion that, because Boucher testified he did not rely on Bunnell's refusal to participate in field sobriety tests when making his arrest, Bunnell's refusal of field sobriety tests cannot be part of the probable cause determination. "In determining whether probable cause exists, the court applies an objective standard … and is not bound by the officer's subjective assessment or motivation." ***State v. Kutz***, 2003 WI App 205, ¶12, 267 Wis. 2d 531, 671 N.W.2d 660.

direct the court to revoke Bunnell's operating privileges pursuant to WIS. STAT. § 343.305(9) and (10).

II. Improper refusal as evidence of impairment

¶22 The Village next argues the circuit court erred by prohibiting the Village from arguing to the jury that it could infer impairment from Bunnell's refusal and by rejecting the Village's request to instruct the jury pursuant to WIS JI—CRIMINAL 235 (2004).[4] It contends it is entitled to argue a refusal constitutes evidence of impairment and the circuit court, by withholding its refusal determination until after the jury rendered the OWI verdict, erroneously prevented the Village from relying on the refusal.

¶23 Bunnell responds the Village never objected in the circuit court to the timing of the court's refusal determination. *See* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727 (appellate court need not consider issues raised for the first time on appeal). He also asserts that the court is not required to make a refusal determination before an OWI trial, and that, even if the timing was improper, the Village would not have been permitted to rely on the refusal at the OWI trial because the court determined Bunnell's refusal was proper.

¶24 We first conclude the Village raised the timing of the refusal determination in the circuit court. On the morning of trial, the Village specifically

[4] WISCONSIN JI—CRIMINAL 235 (2004) provides: "Testimony has been received that the defendant refused to furnish a [blood] sample for chemical analysis. You should consider this evidence along with all the other evidence in the case, giving it the weight you believe it is entitled to receive."

requested that the court make its refusal determination at the close of evidence. The Village explained that, if the court found the refusal was improper, it wanted to argue to the jury that Bunnell's refusal suggested he was impaired. The Village also objected to the court's exclusion of the refusal jury instruction. Therefore, we will consider the Village's arguments.

¶25 We conclude the circuit court erred by withholding its refusal determination until after the jury rendered its verdict in the OWI trial and by preventing the Village from relying on the refusal for evidence of impairment. First, a refusal hearing centers, in part, on whether there was probable cause to arrest a defendant for an OWI-related offense. *See* WIS. STAT. § 343.305(9)(a)5.a. It makes little sense for a court to determine whether an officer had probable cause to arrest *after* the defendant's OWI jury trial. The lawfulness of an OWI arrest can impact an OWI trial.

¶26 Second, it is well-established that evidence of a person's refusal to submit to a chemical test supports an inference that the person was driving while under the influence of alcohol. *See* ***State v. Crandall***, 133 Wis. 2d 251, 257, 394 N.W.2d 905 (1986) (Refusing to take a chemical blood test "not only violates the consent impliedly given under the statute, it reflects consciousness of guilt by the accused."). The prosecution is permitted to rely on evidence of a refusal to suggest the defendant was impaired. *See* ***id***; *see also* ***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979) (In closing arguments, a "prosecutor may comment on the evidence, detail the evidence, [and] argue from it to a conclusion."). Evidence of a refusal is important in an OWI trial because defendants who submit to chemical tests have their results presented at trial and "[f]airness would indicate the defendant failing to submit to the test should not be

put in a superior position" by preventing the prosecution from mentioning the refusal. ***Crandall***, 133 Wis. 2d at 259.

¶27 Here, Bunnell improperly refused the chemical test. Because this improper refusal deprived the Village of a chemical test result, the Village was permitted to rely on Bunnell's refusal as evidence of impairment. However, the circuit court, through its delayed, and ultimately incorrect, refusal determination, erroneously prevented the Village from relying on Bunnell's refusal as evidence of impairment. Specifically, the Village was not permitted to argue to the jury that Bunnell's refusal suggested he was impaired, and the jury was not instructed it could consider the refusal when making its impairment determination. On appeal, Bunnell does not argue that these errors were harmless. *See* ***State v. Carter***, 2010 WI App 37, ¶22, 324 Wis. 2d 208, 781 N.W.2d 527 (beneficiary of trial error must prove error is harmless). Therefore, we reverse and remand for a new OWI trial.

III. Joint evidentiary hearings

¶28 Finally, the Village argues the circuit court erred by joining the evidentiary portions of the refusal hearing and OWI trial. The Village, however, did not object to the joint hearing before the circuit court. We will not consider the Village's argument. *See* ***Huebner***, 235 Wis. 2d 486, ¶10.

By the Court.—Judgment reversed and cause remanded with directions.

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