COURT OF APPEALS
DECISION
DATED AND RELEASED

February 13, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1359

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

COUNTY OF ASHLAND,

Plaintiff-Respondent,

v.

JOHN JAAKKOLA,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Ashland County: ROBERT E. EATON, Judge. *Affirmed.*

MYSE, J. John Jaakkola, pro se, appeals a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant contrary to § 346.63(1)(a), STATS., and an order revoking his driving privileges based upon his refusal to submit to a chemical test pursuant to § 343.305(3)(a), STATS. Jaakkola raises the following issues on appeal: (1) whether the officer had reasonable suspicion to stop him; (2) whether the officer had probable cause for the arrest; (3) whether his statements were inadmissible because the officers failed to read him the ***Miranda***[1] warnings; (4) whether the officers were required to give him a urine test for intoxication when he

[1] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

requested it; (5) whether the officers were required to advise him of the effect of his disabilities on his obligation to take a test for intoxication; and (6) whether the trial court erred by not admitting his exhibits into evidence and by not reopening the trial so he could introduce testimony of an additional witness. Because this court concludes that Jaakkola's contentions are without merit, the judgment and order are affirmed.

On December 2, 1994, deputy Robert Menard was on patrol when he received a dispatch call indicating that an individual at the Bad River Casino had threatened to set fire to the casino and a motorcycle. Menard was further informed that the individual had left the scene on a black motorcycle and was headed east on Highway 2. Almost immediately following this dispatch and in an area consistent with the information, Menard observed Jaakkola operating a black motorcycle headed east on Highway 2. After Menard turned his squad car around, he observed that Jaakkola had parked the motorcycle just off the roadway of the westbound lane facing east. Menard pulled in front of the motorcycle and asked Jaakkola to remain there while he turned his squad car around. After turning his car around, Menard approached Jaakkola to inquire why he was facing the wrong direction on the road and whether he was the individual who made threats at the casino. Menard observed that Jaakkola did not seem to have good balance, his conversation was irrational and an odor of intoxicants emanated from Jaakkola while he talked. After a preliminary breath test indicated a .14% breath alcohol content, Menard arrested Jaakkola for operating while under the influence of an intoxicant.

At the police station, Menard read Jaakkola the Informing the Accused Form and then asked him to submit to a breath test on the Intoxilyzer 5000. Jaakkola agreed to take the breath test. However, after several attempts, Jaakkola did not produce sufficient breath samples to complete the test. Menard then requested that Jaakkola submit to a blood test and Jaakkola refused. Jaakkola was subsequently charged with refusal.

At the refusal hearing, the court announced that it would also regard the hearing as a suppression hearing based upon Jaakkola's contention that Menard lacked authority to stop him and that there was no probable cause for his arrest. At the close of the hearing, the trial court determined that Menard had reasonable suspicion to stop and probable cause to arrest Jaakkola, and that Menard complied with the informing the accused standard. The trial court

further determined that both Jaakkola's failure to provide sufficient breath samples to complete the Intoxilyzer 5000 test and his refusal to take a blood test constituted improper refusals. Accordingly, the trial court revoked Jaakkola's driving privileges for one year. The trial court later convicted Jaakkola of operating while under the influence of an intoxicant.

First, Jaakkola contends that Menard did not have reasonable suspicion to stop him. This issue presents a question of law that this court reviews without deference to the trial court. ***State v. Krier***, 165 Wis.2d 673, 676, 478 N.W.2d 63, 65 (Ct. App. 1991).

Ashland County argues that Menard's first contact with Jaakkola was not a seizure requiring reasonable suspicion and even if it was such a seizure Menard had reasonable suspicion to stop Jaakkola. Because this court concludes that there was reasonable suspicion to stop Jaakkola, we need not consider the County's alternative argument. ***Terry v. Ohio***, 392 U.S. 1 (1968), governs the validity of an investigatory stop. Under ***Terry***, the police officer must reasonably suspect, in light of his or her experience, that some criminal activity has taken or is taking place before stopping an individual. ***State v. King***, 175 Wis.2d 146, 150, 499 N.W.2d 190, 191 (Ct. App. 1993). The focus is on reasonableness and the determination of reasonableness depends on the totality of the circumstances. ***Id.***

In this case Menard had been advised that an individual driving a black motorcycle heading east on Highway 2 had threatened to burn the casino and a motorcycle. Immediately thereafter, Menard observed Jaakkola on a black motorcycle heading east on Highway 2 in an area consistent with the dispatch. In addition, Jaakkola parked his motorcycle on the wrong side of the roadway. The threat to commit a serious crime together with sufficient circumstances indicating that it was Jaakkola who made the threat are sufficient for an investigative stop. Because this court concludes that there was reasonable suspicion authorizing the investigative stop, Jaakkola's contention is without merit.

Jaakkola also contends that the officer had no probable cause to arrest him. The issue whether the officer had probable cause is a question of law that this court reviews de novo. ***State v. Babbitt***, 188 Wis.2d 349, 356, 525

N.W.2d 102, 104 (Ct. App. 1994). Probable cause to arrest is that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed the offense. ***Id.*** Probable cause does not require "proof beyond a reasonable doubt or even that guilt is more likely than not." ***Id.*** at 357, 525 N.W.2d at 104. In this case, Menard testified that: (1) Jaakkola parked his motorcycle facing the wrong way on the roadway; (2) Jaakkola exhibited poor balance; (3) Jaakkola's conversation was irrational; (4) the odor of alcohol emanated from Jaakkola when he talked; and (5) a preliminary breath test indicated intoxication. These factors are sufficient to constitute probable cause necessary to support Jaakkola's arrest. *See* ***id.*** at 356-57, 525 N.W.2d at 104.

Jaakkola next argues that his statements were inadmissible because Menard did not give him the warning required under ***Miranda v. Arizona***, 384 U.S. 436 (1966). This court disagrees. First time drunk driving offenses are civil, noncriminal charges. ***Racine v. Smith***, 122 Wis.2d 431, 435, 362 N.W.2d 439, 441 (Ct. App. 1984) Because Jaakkola's offense was prosecuted as a civil forfeiture action, the ***Miranda*** requirements do not apply. *See* ***Menomonee Falls v. Kunz***, 126 Wis.2d 143, 148, 376 N.W.2d 359, 362 (Ct. App. 1985).

Next, Jaakkola argues that he requested a urine test to determine his blood alcohol level and the officer's denial of his request was error. Jaakkola's argument fails for two reasons. First, the record at the refusal hearing does not disclose that he requested a urine test. At the hearing, Jaakkola asked the officer whether he had made such a request and the officer responded that he did not remember. Jaakkola did not take the stand to testify that he made the request and no evidence was introduced by either side indicating the request was made. Moreover, the alternative test is available only after submitting to the initial test. ***In re Bardwell***, 83 Wis.2d 891, 897, 266 N.W.2d 618, 620 (1978); *see also* ***State v. Renard***, 123 Wis.2d 458, 461, 367 N.W.2d 237, 238 (Ct. App. 1985); § 343.305(5), STATS. Jaakkola's failure to provide two separate adequate breath samples constitutes a refusal under § 343.305(6)(c)3, STATS. In addition, Jaakkola refused to take a blood test. Because Jaakkola did not submit to either test, he has no statutory right to another test. *See* ***Bardwell***, 83 Wis.2d at 897, 266 N.W.2d at 620; § 343.305(5), STATS.

Next, Jaakkola contends that the police were required to advise him of the effect of disabilities on his obligation to take a test for intoxication. The implied consent statute specifically sets forth the information that a law enforcement officer is required to give to an individual at the time a chemical test specimen is requested. *See* § 343.305(4), STATS. Nowhere in this list of rights is there any indication that the individual is to be advised of the effect of disabilities on his taking the test. ***Id.*** While a disability can be a defense to a refusal under § 343.305(9)(a)5.c, STATS., there is no requirement that a law enforcement officer give the advice prior to the taking of a breath or blood alcohol test. Because this court concludes that there is no requirement that such advice be given and Jaakkola fails to adequately develop a due process claim for failing to give the advice, this court rejects the contention and will not address the issue further. *See* ***Goossen v. Estate of Standaert***, 189 Wis.2d 237, 252, 525 N.W.2d 314, 320 (Ct. App. 1994).

Last, Jaakkola contends the trial court erred by not accepting his exhibits in evidence and by not reopening the refusal hearing after its conclusion so he could introduce testimony of an additional witness. These claims are submitted to the sound discretion of the trial court. ***State v. Hereford***, 195 Wis.2d 1054, 1065, 537 N.W.2d 62, 66 (Ct. App. 1995). Accordingly, the trial court's determination must be affirmed on appeal if "it has a reasonable basis and was made in accordance with accepted legal standards and the facts of record." ***Id.***

After the County called a witness and Jaakkola called three witnesses, Jaakkola told the court he did not wish to call any additional witnesses. After the County's closing argument, Jaakkola tried to present the exhibits to the court. The County observed the documents for the first time and objected to them as hearsay. The trial court sustained the objection on the grounds that the exhibits were hearsay and their submission was untimely. Jaakkola then stated he wanted to call another witness and the trial court denied his request.

The trial court correctly concluded that the exhibits were hearsay. The documents that were apparently offered are reports relating to sores on Jaakkola's tongue and his back problems. Jaakkola now contends that the documents were admissible as records of regularly conducted activity or as health provider records. *See* §§ 908.03(6) and (6m), STATS. However, Jaakkola

did not make this argument before the trial court and did not present the testimony of a custodian or other qualified witness. *See* ***id.*** Accordingly, this court concludes that the trial court properly exercised its discretion when it did not admit the exhibits into evidence.

This court also concludes that the trial court did not erroneously exercise its discretion when it did not allow the additional witness after testimony was closed. Jaakkola had rested his case and the court was under no obligation to reopen for the receipt of additional testimony, particularly when Jaakkola did not indicate the identity of the witness or the information sought to be elicited from this witness. Without an offer of proof as to what the witness would testify to, this court cannot conclude that the trial court erroneously exercised its discretion. *See* § 901.03(1)(b), STATS.

Because this court finds no merit to any of Jaakkola's contentions, the judgment and order are affirmed.

By the Court.—Judgment and order affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.