

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 27, 2012

Diane M. Fremgen
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. 2011AP2948-CR

Cir. Ct. No. 10CF28

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DUANE A. WETZEL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marquette County:
RICHARD O. WRIGHT, Judge. *Affirmed.*

Before Lundsten, P.J., Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. Duane A. Wetzel appeals from a judgment of conviction for operating a vehicle while under the influence of an intoxicant as a fifth or sixth offense. Wetzel contends that the circuit court erred in denying his motion to suppress the result of a preliminary breath test that had been

administered pursuant to a jail's booking procedure, and the field sobriety test results obtained after the preliminary breath test's administration. Because the circuit court did not admit the preliminary breath test result, and because the field sobriety test results, which Wetzel concedes sufficed to establish probable cause for his operating-while-intoxicated arrest, were properly administered without considering the preliminary breath test result, we affirm.

BACKGROUND

¶2 On March 7, 2010, Marquette County Deputy Larry Witt stopped Wetzel's vehicle on suspicion that Wetzel was driving with a revoked license. After confirming Wetzel's revoked status, Deputy Witt arrested Wetzel for operating while revoked.¹ Deputy Witt searched, handcuffed, and transported Wetzel to the Marquette County Jail. Upon arrival, Deputy Steve Kemnitz assisted Wetzel out of Deputy Witt's squad car. Deputy Kemnitz detected an odor of intoxicants on Wetzel.

¶3 After Deputies Witt and Kemnitz escorted Wetzel into the jail, Deputy Troy Steege commenced the Marquette County Jail's booking procedure. The jail's booking procedure requires that all individuals submit to a preliminary breath test. Individuals must have a zero alcohol concentration before being placed in the jail's general population.

¶4 Deputy Steege smelled alcohol on Wetzel during the pat-down portion of the booking procedure. Deputy Steege requested Wetzel to submit to a preliminary breath test. Wetzel admitted that he had been drinking and asked

¹ Wetzel does not challenge the validity of his arrest for operating after revocation.

whether he had to take the test. Deputy Steege told Wetzel that the test was a required part of the booking procedure. Wetzel submitted to the test, the result of which indicated an alcohol concentration of 0.16.

¶5 Deputy Steege informed Deputy Witt of Wetzel's preliminary breath test result. Deputy Witt telephoned Sergeant Jordan McCoy and explained that Deputies Kemnitz and Steege smelled intoxicant odors, that Wetzel had four prior operating-while-intoxicated convictions, and that the preliminary breath test result was 0.16. Sergeant McCoy advised that Deputy Witt proceed with an operating-while-intoxicated investigation and conduct field sobriety tests.

¶6 Deputy Witt had Wetzel perform the horizontal-gaze-nystagmus and walk-and-turn tests. Based on Wetzel's performance on the tests, Deputy Witt determined that probable cause existed to cite Wetzel with operating while intoxicated and prohibited alcohol concentration.

¶7 During the subsequent proceedings for those charges, Wetzel moved to suppress the preliminary breath test result and all evidence procured subsequent to the test's administration. After holding a hearing on November 16, 2010, and receiving post-hearing briefs from the parties, the circuit court denied the motion to suppress on April 1, 2011. Wetzel ultimately entered into a plea agreement. The circuit court entered its judgment of conviction on September 14, 2011. Wetzel now appeals.

DISCUSSION

¶8 When reviewing an order on a motion to suppress, we uphold the circuit court's factual findings unless clearly erroneous. *State v. Marten-Hoye*, 2008 WI App 19, ¶5, 307 Wis. 2d 671, 746 N.W.2d 498. However, the

application of constitutional principles to those facts is a question of law. *State v. Drew*, 2007 WI App 213, ¶11, 305 Wis. 2d 641, 740 N.W.2d 404. Moreover, whether the factual findings satisfy the statutory standard of probable cause is a question of law. *County of Jefferson v. Renz*, 231 Wis. 2d 293, 316, 603 N.W.2d 541 (1999). Here, the facts are undisputed and thus we review de novo.

¶9 Wetzel argues that the preliminary breath test was requested and used contrary to WIS. STAT. § 343.303 (2009-10).²

¶10 WISCONSIN STAT. § 343.303 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)* [operating under influence of an intoxicant] . . . 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. *The result of this preliminary breath screening test may be used by the law enforcement officer for the purpose of deciding whether or not the person shall be arrested for a violation of s. 346.63 (1) The result of the preliminary breath screening test shall not be admissible in any action or proceeding except to show probable cause for an arrest, if the arrest is challenged, or to prove that a chemical test was properly required or requested of a person under s. 343.305 (3).* (Emphasis added.)

¶11 The Wisconsin Supreme Court has explained that the “overall scheme” of WIS. STAT. § 343.303 “is to allow officers to use the PBT as a tool to determine whether to arrest a suspect and to establish that probable cause for an arrest existed, if the arrest is challenged.” *Renz*, 231 Wis. 2d at 304. The *Renz* court noted that “[t]his scheme makes the most sense if the officer may request a

² All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

PBT before establishing probable cause of an arrest, to help determine whether there are grounds for arrest.” *Id.* WISCONSIN STAT. § 343.303 does not contain a general prohibition on police requesting a preliminary breath test. *State v. Repenshek*, 2004 WI App 229, ¶25, 277 Wis. 2d 780, 691 N.W.2d 369.

¶12 Wetzel asserts that the deputies violated the statute when they administered the preliminary breath test and when they proceeded to administer the field sobriety tests after obtaining the preliminary breath test result. We do not reach Wetzel’s arguments because, regardless of compliance with the statute and regardless of the preliminary breath test result, Wetzel’s arrest for operating while intoxicated was proper. The State did not offer, and the circuit court did not admit, the preliminary breath test result for any reason, including to establish probable cause for the operating-while-intoxicated arrest. Nor did the police need the preliminary breath test result to proceed with the investigation that did provide the probable cause for the arrest.

¶13 In this case, Wetzel was in jail after having been arrested for driving after revocation. Assuming without deciding that the police needed reasonable suspicion to proceed with an operating-while-intoxicated investigation, the police properly proceeded with that investigation based on the odor of intoxicants and four prior operating-while-intoxicated convictions. In these circumstances, the police did not need the preliminary breath test result to administer the field sobriety tests. Wetzel’s failure to pass the field sobriety tests, combined with the odor of intoxicants and the knowledge that his four prior operating-while-

intoxicated convictions meant that the legal limit for Wetzel was .02, easily supplied probable cause supporting the arrest.³

¶14 Wetzel relies on *State v. Peters*, No. 2009AP384-CR, unpublished slip op. (WI App Oct. 8, 2009). However, even if we were to address the merits of Wetzel's argument, his reliance would be misplaced. In *Peters*, the State sought to use the result of a preliminary breath test to establish probable cause to arrest Peters for operating while intoxicated. In this case, by contrast, as stated above, the State did not seek to use the preliminary breath test result to support probable cause to arrest Wetzel, and the circuit court did not consider it for that purpose. In *Peters*, field sobriety tests were not conducted. Here, not only did Wetzel perform the tests, but his failure of those tests provided probable cause for his arrest. And, Wetzel does not dispute that the field sobriety tests supported a finding of probable cause to arrest him for operating while intoxicated. In sum, *Peters* does not apply here.

¶15 Finally, Wetzel argues for the first time at the end of his reply brief that the State should have laid the proper foundation to establish the reliability of the preliminary breath test machine before the test result could be admissible. Because we have, in effect, assumed without deciding that the preliminary breath test could not be used, we need not address this argument. Still, we observe that his argument ignores that the test result was neither proffered nor admitted and, for that matter, this court does not consider arguments raised for the first time on reply. *Schaeffer v. State Pers. Comm'n*, 150 Wis. 2d 132, 144, 441 N.W.2d 292

³ Wetzel conceded at the suppression hearing that Wetzel's failure to pass the field sobriety tests provided sufficient probable cause to arrest.

(Ct. App. 1989) (“We will not, as a general rule, consider arguments raised for the first time in a reply brief”).

¶16 In sum, Wetzel challenges his conviction based solely on the administration of the preliminary breath test and asserted use of its result. Because the preliminary breath test result was neither necessary to prompt the operating-while-intoxicated investigation, nor used to establish probable cause for the operating-while-intoxicated arrest, Wetzel’s challenges to his operating-while-intoxicated conviction fail.

CONCLUSION

¶17 For the reasons stated above, we affirm the circuit court’s denial of the motion to suppress and affirm the judgment of conviction.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

