COURT OF APPEALS
DECISION
DATED AND FILED

January 10, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1718
Cir. Ct. Nos. 2012TR1659, 2012TR1660

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

DANE COUNTY,

PLAINTIFF-RESPONDENT,

V.

STEVEN D. KOEHN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: STEPHEN E. EHLKE, Judge. *Affirmed*.

¶1 LUNDSTEN, P.J.[1] Steven Koehn appeals a judgment of the circuit court finding him guilty of operating a motor vehicle while under the influence of

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

an intoxicant, as a first offense, and operating a motor vehicle with a prohibited alcohol concentration. Koehn argues that the circuit court erred when it denied his motion to suppress evidence of intoxication. Koehn contends that the arresting deputy lacked the probable cause required to administer a preliminary breath test pursuant to WIS. STAT. § 343.303, and that, without the test result, the deputy did not have probable cause to arrest Koehn. I agree with the circuit court that the deputy did have the requisite level of probable cause to request a preliminary breath test and, therefore, had probable cause to arrest Koehn. I affirm the decision of the circuit court.

Background

¶2 At about 2:30 a.m. on January 21, 2012, a sheriff's deputy was driving northbound on a road in the Township of Bristol, when he observed a vehicle in the ditch on the west side of the road. There was fresh snow on the road, and the deputy observed, from tire tracks in the snow, that the vehicle appeared to have been heading north, had crossed over the southbound lane, and had entered the ditch.

¶3 When the deputy approached the vehicle, he found Koehn asleep behind the wheel and the vehicle was still running. The deputy had some difficulty waking Koehn from his sleep. Once awake, Koehn told the deputy that he had been at a party where he had consumed alcohol. The deputy asked Koehn why he was in the ditch, and Koehn said he had driven into the ditch about an hour and a half before the deputy's arrival. The deputy noted that Koehn smelled of intoxicants.

¶4 The deputy then asked Koehn to perform standardized field sobriety tests. The deputy observed a number of "clues" of intoxication during each part of

the field sobriety tests. He observed all six clues during the horizontal gaze nystagmus test. On the walk-and-turn test, Koehn did not touch his heel to his toe on all of the steps, he stumbled on the turn, and he used his arms for balance by extending them parallel to the ground. During the one-leg stand test, Koehn failed to count properly and again used his arms for balance.

¶5 Based on Koehn's performance on the field sobriety tests, as well as the deputy's other observations, the deputy administered a preliminary breath test (PBT). The result of Koehn's PBT was .139. The deputy then put Koehn under arrest. Koehn later took an intoximeter test that showed a blood alcohol level of .14.

¶6 Koehn moved to suppress the evidence of his intoxication, arguing that the deputy lacked the requisite probable cause to arrest. At the motion hearing, the deputy testified that he has been trained in administering field sobriety tests. He also testified to the clues he had observed when conducting the field sobriety tests, but he did not testify further as to how those clues demonstrated impairment for driving.

¶7 The circuit court denied Koehn's motion to suppress. Based on stipulated facts, the court found Koehn guilty of driving while intoxicated, as a first offense, and operating a motor vehicle with a prohibited alcohol concentration. Koehn appeals.

Discussion

¶8 To request a PBT, an officer must have "probable cause to believe" that the suspect was operating a vehicle while intoxicated. WIS. STAT. § 343.303. In ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 603 N.W.2d 541 (1999) (***Renz***

II), the Wisconsin Supreme Court decided that the standard of probable cause to believe "refers to a 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. Whether probable cause to believe exists is determined by examining the totality of the circumstances. ***State v. Goss***, 2011 WI 104, ¶9, 338 Wis. 2d 72, 806 N.W.2d 918. Whether or not the deputy had the requisite level of probable cause to request that Koehn provide a PBT is a question of law that we review de novo. ***Renz II***, 231 Wis. 2d at 316.

¶9 Koehn argues that, because the deputy did not provide explanatory testimony to explain the significance of the results of the field sobriety tests, those results should have minimal significance in determining whether the deputy had the probable cause to believe Koehn was intoxicated that is required to administer the PBT. That is, Koehn argues that the deputy did not explain why the clues exhibited in the field sobriety tests led the deputy to believe that Koehn was intoxicated. Koehn does not contend that the deputy failed to provide testimony about his training and qualification to administer field sobriety tests.

¶10 I first conclude that, even without the field sobriety test results, the deputy had sufficient probable cause to administer the PBT. The deputy found Koehn asleep in his vehicle in a ditch off the road at 2:30 a.m. Tracks in the snow indicated that Koehn had driven his vehicle over the center line and into the ditch on the other side of the road. Koehn smelled of intoxicants and admitted that he had been consuming alcohol. Although this is sufficient probable cause to support administering the PBT, I will also explain why the circuit court appropriately relied on the results of the field sobriety tests.

¶11 Koehn relies on ***County of Jefferson v. Renz***, 222 Wis. 2d 424, 588 N.W.2d 267 (Ct. App. 1998) (***Renz I***), for the proposition that, in the absence of testimony explaining the significance of the clues of intoxication in field sobriety tests, those results are of "minimal significance." See ***id.*** at 445. In ***Renz I***, the court addressed the level of probable cause required to request a PBT, and applied that standard to the facts before the court, including clues exhibited during the field sobriety tests. *See* ***id.*** at 443-47. In weighing the clues the arresting officer observed during the walk-and-turn portion of the field sobriety tests, the court stated:

> Officer Drayna did not explain the significance of leaving a space of one-half to one inch between heel and toe, and the court made no findings on that. We assume this goes to either balance or ability to follow directions. However, in the absence of some explanatory testimony this evidence … has minimal significance for the capacity to drive safely.

Id. at 445. This court also concluded that only minimal significance could be attached to the fact that Renz exhibited a clue during the finger-to-nose portion of the field sobriety tests by touching the bridge rather than the tip of his nose with his left hand because there was no testimony from the arresting officer indicating the relevance of that clue. ***Id.***

¶12 The County provides two arguments for why I should ignore this holding in ***Renz I*** here. In the following paragraphs, I explain why the County's first argument does not work, and then explain why I agree with the County's second argument.

¶13 Citing ***Blum v. 1st Auto & Casualty Insurance Co.***, 2010 WI 78, 326 Wis. 2d 729, 786 N.W.2d 78, the County argues that, because ***Renz I*** was overruled, it no "longer possesses any precedential value, unless [the overruling]

court expressly states otherwise." *See* ***Blum***, 326 Wis. 2d 729, ¶42. That is, the County asserts that nothing in ***Renz I*** retains precedential value. This is incorrect. ***Renz I*** was not overruled by ***Renz II***, but rather was reversed and remanded to the circuit court. *See* ***Renz II***, 231 Wis. 2d at 317. Courts have limited ***Blum*** to the scenario where a case was overruled as opposed to reversed. *See* ***State v. Harris***, 2010 WI 79, ¶34 n.12, 326 Wis. 2d 685, 786 N.W.2d 409 ("Only when a case is overruled does it lose all of its precedential value."); ***State v. Jackson***, 2011 WI App 63, ¶15 n.3, 333 Wis. 2d 665, 799 N.W.2d 461 (affirming the position that "a reversal of a court of appeals opinion, on other grounds, does not affect the validity of the remaining holding or holdings of that lower court opinion unless the supreme court expressly says so"), *review denied*, 2011 WI 100, 337 Wis. 2d 51, 806 N.W.2d 639 (No. 2010AP678). Thus, in cases where an opinion is reversed but not overruled, the general rule stands that holdings not specifically reversed on appeal retain precedential value.

¶14 Still, the County is correct that the ***Renz II*** reversal of ***Renz I*** *does* affect the validity of the ***Renz I*** discussion of use of the field sobriety observations.

¶15 In ***Renz II***, the court relied on field sobriety test results that the ***Renz I*** court concluded had only minimal significance in supporting probable cause. The ***Renz II*** court cited the fact that Renz was not able to touch the tip of his nose with his left finger during the finger-to-nose test. ***Renz II***, 231 Wis. 2d at 316-17. The court also noted that Renz "left a space between his steps" during the walk-and-turn test. ***Id.*** at 316. Unlike this court's decision in ***Renz I***, the ***Renz II*** court included these clues in its analysis of whether there was probable cause to believe Renz was intoxicated and to request a PBT. *See* ***Renz II***, 231 Wis. 2d at 316-17. Thus, the ***Renz II*** court implicitly found that courts may give significant

weight to a description of a defendant's performance on field sobriety tests in the absence of testimony as to the significance of particular instances of performance.

¶16 Consistent with the analysis in ***Renz II***, I conclude that the results of the field sobriety tests here add to probable cause. In particular, I need no testimony to tell me that stumbling, missing heel-to-toe on some steps, using arms for balance during the walk-and-turn test, and using arms for balance and failing to count properly on the one-leg stand test are indicators of intoxication.

Conclusion

¶17 The deputy's observations, with or without the results of the field sobriety tests, were sufficient to support probable cause to believe that Koehn was intoxicated. Thus, administering the PBT was appropriate. I affirm the decision of the circuit court.

By the Court.—Judgment affirmed.

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