

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

April 10, 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, 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. 95-2369**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**ISABEL GOMEZ,**

**Defendant-Appellant.**

APPEAL from an order of the circuit court for Waukesha County:  
JOSEPH E. WIMMER, Judge. *Affirmed.*

SNYDER, J. Isabel Gomez appeals from an order finding that he refused to submit to a chemical test in violation of § 343.305, STATS. Gomez contends that the arresting officer did not have probable cause to arrest him for operating a motor vehicle while under the influence of intoxicants. He further contends that the trial court applied an incorrect burden of proof when it found that he refused to permit a blood test after the officer determined a breath test would not be taken. Because we conclude that there was probable

cause for the arrest and that the trial court applied the correct burden of proof, we affirm.

Officer Michael Knetzger was dispatched in the early evening to the scene of a single-car accident. Upon his arrival, Knetzger observed a car which appeared to have been driven off the road, into a yard, striking a telephone pole. Witnesses at the scene informed Knetzger that the driver of the vehicle was inside a nearby residence.

Knetzger entered the residence and Gomez was identified as the driver of the vehicle. Knetzger noted that Gomez was bleeding from the area of his mouth. Knetzger asked him what had happened and Gomez responded that a deer ran in front of his car, he swerved to avoid the animal and he drove off the road. During their conversation, Knetzger smelled an odor of intoxicants on Gomez' breath and noticed that he slurred his speech.

Knetzger asked Gomez whether he had been drinking. Gomez admitted that he had consumed "about 6 or 7 drinks."<sup>1</sup> Knetzger also asked Gomez whether he was injured or was experiencing any dizziness or lightheadedness, and Gomez responded that he was not. Gomez agreed to submit to field sobriety tests, but he was unable to perform the tests satisfactorily.<sup>2</sup> While Gomez testified that his speech was slurred because of the

---

<sup>1</sup> This fact was disputed at the refusal hearing when Gomez testified that he had only consumed a single drink before the accident and stated that was what he had told Knetzger.

<sup>2</sup> Knetzger testified that when Gomez recited the alphabet, the letters between "d" and "z" were so badly slurred that they were not understandable. Gomez skipped a number when he was asked to count backwards, and again his speech was slurred. He was unable

injury to his mouth and that he had difficulty walking because of injuries to his knees, he did not relate these infirmities to Knetzger. Gomez also testified that he had only a vague recollection of this time period.

After Gomez failed to satisfactorily perform the field sobriety tests, Knetzger placed him under arrest and transported him to the hospital for treatment and a blood test.<sup>3</sup> There the officer read him the Informing the Accused form. Gomez indicated that he understood it, but he refused to submit to a blood test.<sup>4</sup>

Gomez requested a refusal hearing. At the hearing, the trial court found that there was probable cause for Knetzger to request the blood test and that the other three criteria for finding a refusal unreasonable were met. *See State v. Nordness*, 128 Wis.2d 15, 28, 381 N.W.2d 300, 305 (1986). Gomez' driving privileges were then revoked for one year and this appeal followed.

Gomez first contends that Knetzger did not have probable cause to believe that he was operating a motor vehicle while intoxicated. Because there

(..continued)

to perform the heel-to-toe walking test because he could not maintain his balance, and he could not follow the directions for the finger-to-nose exercise.

<sup>3</sup> Knetzger testified that after he placed Gomez under arrest, he had Gomez transported to the hospital. The usual procedure would be to take an individual to the police station for a breath test. However, because Gomez was injured and he told Knetzger he had asthma, he was transported to the hospital for a blood test. Gomez claims that he was told at the scene of the accident that no tests would be administered.

<sup>4</sup> Gomez disputed this testimony, claiming that no forms were ever read to him and that there was no communication between Knetzger and himself regarding any tests. The form was introduced into evidence.

are disputed facts, we review this issue as a mixed question of fact and law. *See State v. Drogsvold*, 104 Wis.2d 247, 256, 311 N.W.2d 243, 247 (Ct. App. 1981). In this case, the factual determination will not be reversed on appeal unless it is contrary to the great weight and clear preponderance of the evidence. *See id.*

Under *Nordness*, in a probable cause determination the trial court must ascertain the plausibility of the arresting officer's account. *See Nordness*, 128 Wis.2d at 36, 381 N.W.2d at 308. The trial court is not to weigh the evidence between the parties. *Id.* Probable cause exists where the totality of the circumstances known to the officer would lead a reasonable police officer to believe that the individual was operating a motor vehicle while intoxicated. *Id.* at 35, 381 N.W.2d at 308.

The factors recited by Knetzger in arriving at a determination that there was probable cause for Gomez' arrest included: (1) an odor of intoxicants, (2) slurred speech, (3) Gomez' admission that he had consumed six or seven drinks, and (4) Gomez' failure to satisfactorily perform a number of field sobriety tests. Knetzger also testified that he asked Gomez whether he was injured, felt dizzy or was lightheaded. Gomez denied any injuries or dizziness.

In making the probable cause determination, the trial court recognized that Gomez' slurred speech could have been attributed to the injury to his mouth. The court further stated that it was possible that Gomez may have had difficulty on several of the field sobriety tests because of his injuries and the fact that his face hit an air bag. However, even without that evidence

the court found that there was “obvious probable cause” to sustain Gomez' arrest. We agree.

Gomez counters this with an argument that since his erratic driving was explained (as caused by a deer) and the field sobriety tests “[could not] assist the officer” (because of his injuries), the odor of intoxicants alone could not provide the sole basis for his arrest.

This argument fails to take into account that while the trial court opined that some of Gomez' difficulties with the sobriety tests could have been attributable to his injuries, there were other unexplained difficulties that Gomez encountered in performing the requested field sobriety tests. For example, he was unable to follow the directions for the finger-to-nose test and would not keep his eyes closed. Not only was Gomez unable to perform any of the tests satisfactorily,<sup>5</sup> Knetzger also considered the odor of intoxicants and Gomez' admission that he had consumed six or seven drinks.

Furthermore, at no point did Gomez tell Knetzger that his injuries were affecting his ability to perform the field sobriety tests. In fact, Gomez responded in the negative to direct questions about his condition and possible injuries. He refused medical treatment. The findings of the trial court were not against the great weight and clear preponderance of the evidence. We uphold the trial court's finding that Knetzger had probable cause to arrest Gomez.

---

<sup>5</sup> He did correctly recite the months of the year, but his speech was slurred.

Gomez next contends that the trial court applied an incorrect burden of proof in finding his refusal to submit to an evidentiary blood test unreasonable. He argues that the trial court erroneously applied a burden of probable cause to its determination, and that the correct burden was by the great weight and clear preponderance of the evidence. Gomez cites to the court's statement, "[T]he court further notes that the burden of proof in a refusal case is only probable cause," as proof that the court utilized this standard in assessing all of the evidence.

The issues to be addressed at a refusal hearing are limited to whether: (1) the officer had probable cause to believe the individual was driving or operating a motor vehicle while under the influence, (2) the officer read the individual the Informing the Accused form, (3) the person refused to permit the test, and (4) the refusal was due to a physical inability to submit to the test due to a disability or disease unrelated to the use of alcohol. *See id.* at 25-26, 381 N.W.2d at 304.

In order to place the disputed statement in context, it is necessary to examine the trial court's findings. At the refusal hearing, the trial court addressed each of the mandated issues in turn. It discussed all of the evidence which led to Knetzger's decision to arrest Gomez. The court then made the contested burden of proof statement. Following the cited language, the court reiterated its earlier conclusion that Knetzger was entitled to request the blood test. At this point, the court addressed the remaining three issues. The court found that Gomez was read the Informing the Accused form and that he

indicated that he understood it as read. The court also found that Gomez was asked to submit to a blood test at the hospital and that he refused. It then noted that even though Gomez may have been “somewhat injured,” those injuries did not form a proper basis for Gomez' refusal of the blood test.

Our review of the record leads us to conclude that the trial court applied the probable cause standard only in assessing Knetzger's decision to arrest Gomez and require him to submit to a blood test. The remaining issues were questions of credibility, dependent upon whether Knetzger's account was more credible than Gomez' account. The trial court assessed the credibility of the witnesses, including Gomez' testimony that he remembered only “[v]aguely” what occurred, and found that Knetzger's testimony was more believable than the testimony offered by Gomez.

Because we conclude that there was probable cause to request the evidentiary blood test and that the trial court utilized the appropriate burden of proof when it found the refusal was unreasonable, we affirm.

*By the Court.* – Order affirmed.

This decision will not be published. *See* RULE 809.23(1)(b)4, STATS.