COURT OF APPEALS
DECISION
DATED AND RELEASED

July 31, 1996

No. 95-2947

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

COUNTY OF WAUKESHA,

Plaintiff-Respondent,

v.

ROBERT M. HALLENBECK,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Waukesha County: MARIANNE E. BECKER, Judge. *Affirmed*.

SNYDER, J. Robert M. Hallenbeck appeals from a judgment convicting him of operating a motor vehicle with a prohibited blood alcohol concentration contrary to § 346.63(1)(b), STATS. Hallenbeck complains that a preliminary breath test (PBT) was obtained without probable cause and that the wrongly obtained PBT result tainted the subsequent field sobriety tests. He further argues that the trial court erred by improperly limiting the cross-examination of the Intoxilyzer operator and refusing to give a requested

circumstantial evidence instruction. We resolve all of the issues against Hallenbeck and affirm the judgment.

The facts are undisputed. Waukesha County Deputy Sheriffs Charles Gundrum and Nancy Neustaedtir-Heil were on a routine patrol when they observed Hallenbeck's vehicle parked off to the side of the road. Gundrum observed occupants in the vehicle and that the headlights were on. The parked vehicle appeared unusual because of the time of day (10:30 p.m.), the lack of other traffic and the "open field type area." The deputies stopped to determine if there was anything wrong.

Gundrum approached the parked vehicle and asked the driver, Hallenbeck, why he was parked there. Although he did not respond immediately, he then stated that he had to relieve himself and inquired if that was against the law or disorderly conduct. During this exchange, Gundrum noticed that Hallenbeck's speech was slurred, his eyes were glassy and that there appeared to be the smell of marijuana coming from the interior of the vehicle. After instructing Hallenbeck to stay in the vehicle, Gundrum returned to the squad car to request Neustaedtir-Heil's assistance.

Both deputies returned to Hallenbeck's vehicle, where Hallenbeck responded to Neustaedtir-Heil's questions by admitting that he had been drinking and that he had driven the vehicle, which was still running, to the parked location. Neustaedtir-Heil instructed Hallenbeck to turn off the vehicle and step to the rear of the car. At that time, Gundrum returned to the squad car with Hallenbeck's license and ran a license check.

While Gundrum was conducting the license check, Neustaedtir-Heil asked if Hallenbeck would consent to a PBT and he agreed. Prior to making this request, Neustaedtir-Heil had observed or knew the following: the presence of the odor of intoxicants, that Hallenbeck appeared to have been drinking, and Hallenbeck's admissions that he had been drinking and had driven the vehicle to its parked location. The PBT indicated a BAC test result of 0.13% by weight.

After Neustaedtir-Heil conducted the PBT, Gundrum returned from the record check procedure and conducted field sobriety tests.[1] As a result of those tests, Hallenbeck was placed under arrest for operating a motor vehicle while under the influence of intoxicants.

A jury found Hallenbeck guilty of operating a motor vehicle with a prohibited blood alcohol concentration and this appeal followed.[2]

Hallenbeck first argues that the PBT was administered without probable cause, as required by § 343.303, STATS., which provides in part:

> If a law enforcement officer has probable cause to believe that the person is ... or has violated [the drunk driving laws] the officer ... *may request* the person to provide a sample of his or her breath for preliminary breath screening test. ... The result of this ... test *may be used* by the ... officer for the purpose of deciding whether

[1] Hallenbeck's performance on the field sobriety tests was as follows: the alphabet test, acceptable but speech slurred; the one-leg stand test, failed; the finger-to-nose test, failed; and the heel-to-toe test, sidestepped on the fourth step to keep his balance.

[2] Although also charged with the companion charge of operating while under the influence contrary to § 346.63(1)(a), STATS., Hallenbeck was acquitted of that charge.

> or not the person shall be arrested for a violation of [the drunk driving laws] .... [Emphasis added.]

The County concedes that the deputy requested that Hallenbeck consent to the PBT without having probable cause. Because of that concession, we need only address the impact of the statutory violation as presented in Hallenbeck's appeal. This presents a question of law which we decide de novo. *See* ***First Nat'l Leasing Corp. v. Madison,*** 81 Wis.2d 205, 208, 260 N.W.2d 251, 253 (1977).

Hallenbeck first contends that the taking of his breath sample by the violated PBT process was an unconstitutional search and seizure. The taking of a breath sample is a search and seizure under the provisions of the United States and Wisconsin Constitutions. ***Milwaukee County v. Proegler***, 95 Wis.2d 614, 623, 291 N.W.2d 608, 612 (Ct. App. 1980). Whether a party has standing to challenge the constitutionality of a search and seizure based upon a given set of facts is a question of law that we review without deference to the trial court determination. ***State v. Fillyaw***, 104 Wis.2d 700, 711, 312 N.W.2d 795, 801 (1981), *cert. denied*, 455 U.S. 1026 (1982). The remedy is suppression of the illegally obtained evidence. ***Wong Sun v. United States***, 371 U.S. 471, 484 (1963). Hallenbeck then reasons that because the PBT was obtained without probable cause, all subsequent evidence should be suppressed. We disagree.

The PBT is one of several elements which goes to the existence of probable cause. ***Dane County v. Sharpee***, 154 Wis.2d 515, 520, 453 N.W.2d 508, 511 (Ct. App. 1990). It is only a part of the totality of circumstances upon which an officer's determination of probable cause may rest. ***Id.*** The trial court found that probable cause to arrest existed absent the results of the PBT. We note the

following evidence to support the arrest for operating while intoxicated: the car was parked in an unusual location with its headlights on; Hallenbeck admitted to having consumed "a few" alcoholic beverages and to driving the vehicle to its present location; a physical appearance indicative of intoxication—glassy eyes, slurred speech and an odor of intoxicants; and his failing three of the four field sobriety tests administered. Our independent review of the record convinces us that under the totality of the circumstances test, there was sufficient evidence to support probable cause for the arrest apart from the PBT results.[3]

Hallenbeck next argues that the illegally obtained PBT results "tainted" the officers' observations of the subsequently conducted field sobriety tests. As a consequence, the field sobriety tests became too unreliable to establish probable cause.

Courts look to the totality of the facts and circumstances faced by an officer at the time of the arrest. ***Sharpee***, 154 Wis.2d at 518, 453 N.W.2d at 510. The available facts facing the officer need only be "sufficient to lead a reasonable officer to believe guilt is more than a possibility." ***Id.*** (quoted source omitted).

At the probable cause hearing, Gundrum testified in detail as to Hallenbeck's performance on the field sobriety tests, including the reasons Hallenbeck failed three of the four tests. He also testified that before

[3] We further note that while testifying at the probable cause hearing, Gundrum did not reference the results of the PBT.

administering any tests, he had observed other indications that Hallenbeck had been drinking: his eyes were glassy and his speech was slurred. Coupled with this was Hallenbeck's admission that he had been drinking. There are no facts in the record to support the position that Gundrum's decision to arrest Hallenbeck was based solely or inappropriately on the results of the PBT, rather than on the totality of the circumstances facing the officer. We reject Hallenbeck's contention to the contrary.

Hallenbeck next contends that his defense was improperly hampered when the trial court sustained the County's objections to his attempt to cross-examine the Intoxilyzer operator. The defense sought to elicit testimony regarding the "units of measure in which the Intoxilyzer result was reported with regard to what they represent in common life."

Whether a witness qualifies as an expert is a matter resting within the sound discretion of the trial court, and absent a misuse of that discretion, the trial court's ruling will stand. ***State v. Robinson,*** 146 Wis.2d 315, 332, 431 N.W.2d 165, 171 (1988). Furthermore, expert witnesses may only testify within the areas in which they are qualified. ***Brain v. Mann,*** 129 Wis.2d 447, 454, 385 N.W.2d 227, 230 (Ct. App. 1986).

The trial court sustained the prosecution's objections to defense counsel's attempt to pursue this line of questioning. Although an Intoxilyzer operator is an expert in running the machine and judging whether it is functioning as it should be, he or she is not qualified to testify as an expert on the internal functioning of the machine. It is important to note that this is not an

issue of whether the court would have permitted the testimony, but rather whether this witness was qualified to testify as to this information. While we conclude that the defense was properly precluded from eliciting this information from this witness, the sought-after information may have been admissible from a properly qualified expert.

Hallenbeck's final issue on appeal arises from his contention that the trial court erred when it failed to give the jury a requested instruction on circumstantial evidence. The trial court must exercise discretion in using jury instructions to fully and fairly assist the jury in making a reasonable analysis of the evidence. *See* ***State v. Dix,*** 86 Wis.2d 474, 486, 273 N.W.2d 250, 256, *cert. denied*, 444 U.S. 898 (1979). The trial court has great discretion in the choice of language and emphasis in framing jury instructions. ***Id.***

We conclude that the trial court exercised its discretion in declining to give the circumstantial evidence instruction. The trial court reasoned:

> I'm satisfied that juries in these cases are able to reach a decision without an additional instruction on circumstantial evidence. ... This Court does believe that jurors, juries are so over instructed that it becomes difficult for them to move, and specially [sic] on this particular charge I'm satisfied they don't need that and it is not necessarily of assistance to them. I simply decline to give it as unnecessary.

The trial court properly exercised its discretion and found that the requested instruction would not assist the jury in its analysis of the evidence.

By the Court. – Judgment affirmed.

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