

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

July 31, 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. 95-3320

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LINDA D. DAVIS,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Dane County:
STUART A. SCHWARTZ, Judge. *Affirmed.*

SUNDBY, J. Defendant Linda D. Davis appeals from a judgment after a court trial convicting her of operating a motor vehicle while under the influence. Her appeal brings up for our¹ review the trial court's order denying her motion to suppress all evidence obtained by the police in effecting her arrest, particularly field sobriety tests, because the police did not have probable cause to believe that she had been operating a motor vehicle while her ability

¹ This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS. "We" and "our" refer to the court.

was impaired. She presents a double jeopardy issue which she acknowledges has been decided against her in *State v. McMaster*, 198 Wis.2d 542, 543 N.W.2d 499 (Ct. App. 1995), *review granted*, 546 N.W.2d 468 (Wis. Mar. 12, 1996), solely to preserve the issue for possible review by the supreme court.

Her other issue arises out of our decision in *State v. Babbitt*, 188 Wis.2d 349, 525 N.W.2d 102 (Ct. App. 1994), where we held that the trial court properly relied on defendant's refusal to submit to field sobriety tests in determining the existence of probable cause. Davis argues that requiring field sobriety tests constitutes a seizure of the person which exceeds the permissible bounds of an investigative traffic detention and becomes, in legal contemplation, an arrest.

She argues that when a police officer has the power to consider a suspect's refusal to cooperate with his or her instructions as a basis for arrest, the officer's detention of the suspect exceeds the permissible scope of a *Terry*² stop or investigative traffic detention. She quotes from *Terry v. Ohio*, 392 U.S. 1 (1968), as follows: "Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation." *Id.* at 34 (White, J., concurring).

Davis's argument might be persuasive were it not for the fact that she consented to perform field sobriety tests and other reasonable investigative measures, including chemical tests, when she applied for and was granted the privilege to operate a vehicle on a public highway of this state. Section 343.305(2), STATS., provides in part:

Any person who ... drives or operates a motor vehicle upon the public highways of this state, or in those areas enumerated in s. 346.61, is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her

² *Terry v. Ohio*, 392 U.S. 1 (1968).

blood or breath, of alcohol, controlled substances, a combination of alcohol and controlled substances, other drugs or a combination of alcohol and other drugs when requested to do so by a law enforcement officer under sub. (3)(a) or (am) or when required to do so under sub. (3)(b)....

Section 343.305(3)(c) provides: "This section does not limit the right of a law enforcement officer to obtain evidence by any other lawful means."

If a person requested by a law enforcement officer, refuses to submit to a chemical test, the law enforcement officer shall immediately take possession of the person's license and prepare a notice of intent to revoke the person's operating privilege, by court order under subsection (10). The person subject to such notice may request a hearing and if the hearing is held, one of the issues is whether the officer had probable cause to believe the person was driving or operating a motor vehicle while under the influence. Section 343.305(9), STATS. If the court finds that the person improperly refused to take the chemical test, the court shall proceed to revoke the person's operating privilege, as provided in § 343.305(10).

As we have repeatedly noted, probable cause to arrest an operator for operating while under the influence may be based solely upon the officer's observations of the operator's manner of operating his or her vehicle, and the officer's personal observations of the operator's behavior. Field sobriety tests serve to confirm the law enforcement officer's personal observations. However, such tests are of advantage to the operator because the operator is thereby given the opportunity to show that he or she is not impaired. Such tests are far less intrusive than chemical tests and benefit both the public and the operator.

We do not hesitate to hold that when a person applies for and is granted the privilege of operating a motor vehicle upon a public highway of this state, he or she impliedly consents to reasonable investigative measures to determine whether an operator is too impaired to be allowed to continue his or her vehicle on the highways. In *Terry* and subsequent cases on which Davis relies, the "suspect" had not given consent to the law enforcement officers to subject him or her to any kind of investigation.

The entire basis of the implied consent law is that operating a motor vehicle on a public highway in Wisconsin is a privilege, and a person who elects to apply for and receive an operating privilege agrees to submit to reasonable investigation to determine whether such person may be too impaired to operate a vehicle. Field sobriety tests are a reasonable investigative means by which a law enforcement officer makes a decision as to the vehicle operator's ability to operate without endangering the public safety. An operator who applies for and receives a license to operate a vehicle upon a public highway in Wisconsin impliedly consents to such reasonable investigative measures.

By the Court. — Judgment affirmed.

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