

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

May 21, 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. 95-3447

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WILLIAM OSCAR MARQUIS,

Defendant-Appellant.

APPEAL from an order of the circuit court for Milwaukee County:
RAYMOND E. GIERINGER, Reserve Judge. *Affirmed.*

SULLIVAN, J. Attorney William Oscar Marquis appeals from an order revoking his motor vehicle operating privileges for failing to submit to a blood alcohol content test under § 343.305, STATS. He argues that the trial court erred when it found that the police had probable cause to seize and subsequently arrest him. He also argues that the police did not properly comply with § 343.305(4), STATS., and inform him of the consequences of failing to submit to a blood alcohol test. Finally, he contends the trial court erred when

it found that he refused to submit a breath sample to the police. This court rejects his arguments and affirms.¹

I. BACKGROUND.

Village of Whitefish Bay Police Officer Todd Bersell responded to an anonymous call of an intoxicated man arguing with a taxi driver in the area of 5200 North Diversey Boulevard in Whitefish Bay. Officer Bersell testified at pre-trial hearings that when he approached the area, the taxi driver, Hubert Appleton, flagged him down and told him there was an intoxicated man driving a blue auto that almost hit his cab. Bersell testified that he drove a short distance and observed a dark blue auto parked in front of a house with its right wheels parked two feet past the curb, resting on the grass between the road and the sidewalk. Further, the rear passenger door was six inches from a tree. Bersell also stated that he observed the passenger side of the car had "sideswiped damage" and was missing both the rear door handle and passenger-side mirror.

Bersell also testified that as he approached the car, he saw a man walking toward the curb from the left rear part of the car. According to Bersell, the man had a "difficult time keeping his balance." Bersell approached the man and asked for his identification, which the man, Marquis, provided. Marquis then asked Bersell, "What is this?" Bersell testified that he told him that he was investigating a report of an intoxicated driver. Bersell then asked Marquis if he had been driving. According to Bersell, Marquis stated that "he was out with ten Milwaukee homicide detectives and a judge at Coerper's 5 O'Clock Club and he just returned and parked the auto." Bersell stated that Marquis's speech was "very slurred," that his eyes "appeared glazed over," and that there was a "strong odor of intoxicating beverage[s]." Further, Marquis was "swaying" and "having a hard time keeping his balance standing in one spot."

Bersell asked Marquis to perform field sobriety tests which, according to Bersell, Marquis failed. Marquis admitted to having a couple drinks. Bersell then arrested Marquis for operating a motor vehicle while

¹ This appeal is decided by one judge, pursuant to § 752.31(2), STATS.

intoxicated. Marquis then refused to take a blood alcohol test, which will be discussed in further detail below.

Marquis received both a refusal hearing for refusing to submit to a blood alcohol test, and a bench trial for operating a motor vehicle while intoxicated— second offense. The trial court found that Marquis refused to submit to a blood alcohol test under § 343.305, STATS., and suspended his operator's permit. The trial court, however, did find Marquis not guilty of the charge of operating a motor vehicle while intoxicated.

II. ANALYSIS.

Marquis first challenges the trial court's determination that the police had probable cause to arrest him. He argues that the police neither had a reasonable suspicion sufficient to stop him, nor probable cause to subsequently arrest him. This court rejects his arguments.

A. Reasonable Suspicion for Stop.

“Whether a stop meets statutory and constitutional standards is a question of law subject to de novo review.” *State v. Drexler*, 199 Wis.2d 128, 133, 544 N.W.2d 903 (Ct. App. 1995). The police may detain a person in appropriate circumstances for purposes of investigating possible criminal behavior even though they lack probable cause to make an arrest. *State v. Jackson*, 147 Wis.2d 824, 829, 434 N.W.2d 386, 389 (1989). Hence, the essential question is whether the police action was reasonable under all the facts and circumstances present. *Id.* at 831, 434 N.W.2d at 389. “The question of what constitutes reasonable suspicion is a common sense test. Under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience?” *Id.* at 834, 434 N.W.2d at 390.

Clearly the officer had reasonable suspicion for the stop under all the facts and circumstances available to him. The anonymous call alerted Officer Bersell to the altercation, and Appleton informed him that the other

driver was “driving a blue car.” Bersell located a dark blue car a short distance away from Appleton. The car was parked over the curb, inches from a tree, with damage to its passenger side. Officer Bersell then noticed Marquis walking from the driver's side of the car and that he had a difficult time keeping his balance. Under the totality of the circumstances, Bersell had a reasonable suspicion to stop Marquis for purposes of investigating criminal behavior. *Id.*

B. Probable Cause for Arrest.

Probable cause to arrest “generally refers to that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime.” *State v. Nordness*, 128 Wis.2d 15, 35, 381 N.W.2d 300, 308 (1986) (citation omitted). Hence, “probable cause exists where the totality of the circumstances within the arresting officers knowledge at the time of the arrest would lead a reasonable police officer to believe, in this case, that the defendant was operating a motor vehicle while under the influence of an intoxicant.” *Id.*

Bersell testified that Marquis had difficulty keeping his balance, admitted to recently drinking alcohol and driving his car, smelled of alcoholic beverages, had glazed-over eyes, slurred his speech, and failed several field sobriety tests. Under the totality of circumstances, and given Bersell's training and experience, this court concludes, as did the trial court, that these factors were sufficient to establish probable cause to arrest Marquis. *See, e.g., Drexler*, 199 Wis.2d at 134, 544 N.W.2d at 905 (discussing factors for probable cause in O.W.I. cases). There was no trial court error.

C. Police Compliance with § 343.305(4), STATS.

Marquis next challenges the trial court's determination that the police properly informed him of the consequences of failing to submit to a blood alcohol test as required by § 343.305(4), STATS.² He argues that he was

² Section 343.305(4), STATS., provides:

(4) INFORMATION. At the time a chemical test specimen is requested under sub.

confused and did not understand what the police were saying when they read the "Informing the Accused" form.

Police must substantially comply with the procedure established in § 343.305(4), STATS. Complete compliance is not required. *State v. Wilke*, 152 Wis.2d 243, 250, 448 N.W.2d 13, 15 (Ct. App. 1989).

Here, Officer Bersell testified that he read the entire "Informing the Accused" form to Marquis. He spent over five minutes going over the form with Marquis. He testified that Marquis "kept interrupting" him and asking what the form meant. Further, Bersell testified that he re-read the section of the form and clarified it for him when Marquis questioned him about it. Bersell then re-read the entire form to Marquis. The trial court accepted the credibility of the officers' testimony on this issue.

(..continued)

(3)(a) or (am), the person shall be orally informed by the law enforcement officer that:

- (a) He or she is deemed to have consented to tests under sub. (2);
- (b) If testing is refused, a motor vehicle owned by the person may be immobilized, seized and forfeited or equipped with an ignition interlock device if the person has 2 or more prior suspensions, revocations or convictions within a 10-year period that would be counted under s. 343.307(1) and the person's operating privilege will be revoked under this section;
- (c) If one or more tests are taken and the results of any test indicate that the person has a prohibited alcohol concentration and was driving or operating a motor vehicle, the person will be subject to penalties, the person's operating privilege will be suspended under this section and a motor vehicle owned by the person may be immobilized, seized and forfeited or equipped with an ignition interlock device if the person has 2 or more prior convictions, suspensions or revocations within a 10-year period that would be counted under s. 343.307(1); and
- (d) After submitting to testing, the person tested has the right to have an additional test made by a person of his or her own choosing.

Marquis presents this court with nothing from which we can conclude that the officers failed to substantially comply with the mandated procedure of § 343.305(4). *Id.*³

D. Trial Court Ruling on Refusal.

The trial court ruled that there was insufficient evidence to establish that Marquis had a medical condition that would justify him in refusing to submit to the breath test. Marquis testified that he told the officers he had emphysema; he also testified that he could not even blow up a balloon.

This court reviews a challenge to a trial court's application of facts to a statutory standard *de novo*. *Pulvermacher Enters. v. DOT*, 166 Wis.2d 234, 238, 479 N.W.2d 217, 219 (Ct. App. 1991). Under § 343.305(1), STATS., any person who operates a motor vehicle is deemed to consent to a blood alcohol content test when requested by the police. *Village of Elkhart Lake v. Borzyskowski*, 123 Wis.2d 185, 191, 366 N.W.2d 506, 509 (Ct. App. 1985) A person, however is not deemed to refuse the test if the preponderance of the evidence shows that “the refusal was due to a physical inability to submit to the test due to a physical disability or disease unrelated to the use of alcohol.” Section 343.305(9)(a)5.c, STATS.

This court's review of the record does not establish by a preponderance of the evidence that Marquis had a physical inability to submit to the test. There was no medical testimony. Marquis never told the officers that his alleged emphysema would prevent him from being able to take the breath test. Nor did Marquis appear to the officers to be “short of breath,” “wheezing,” “coughing,” or evidencing any other physical manifestation from which they could determine that Marquis was physically unable to submit to a blood alcohol content test. From the scant evidentiary record on this issue, this court cannot conclude that there was error.

³ Marquis also argues that the police erred by not observing him for twenty minutes before processing his refusal to submit to a blood alcohol test. He cites to WIS. ADM. CODE § TRANS. 311.06(3)(a), as a basis for this argument. This code section only applies to “the collection of a breath specimen,” not processing of a refusal to submit to a blood alcohol test.

In sum, this court rejects Marquis's argument and affirms the order revoking his operating privileges.

By the Court. – Order affirmed.

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