COURT OF APPEALS
DECISION
DATED AND RELEASED

May 23, 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. 96-0036-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RANDOLPH O. NEUMEYER,

Defendant-Appellant.

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

VERGERONT, J.[1] Randolph Neumeyer appeals from a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant, in violation of § 346.63(1)(a), STATS. He raises two issues on appeal. First, he contends that his prosecution and sentence subjected him to double jeopardy because he had previously been punished in administrative proceedings by suspension of his operating privileges. Second, he contends the trial court erred in denying his motion to suppress certain evidence because the police officer's request that he perform field sobriety tests constituted an arrest

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

and was not supported by probable cause. We reject both arguments and affirm.

Neumeyer acknowledges that we recently held in ***State v. McMaster***, 198 Wis.2d 542, 543 N.W.2d 499 (Ct. App. 1995), *petition for review granted*, (Wis. March 12, 1996), that criminal prosecution for operating a motor vehicle with a prohibited blood alcohol concentration after administrative suspension of operating privileges does not violate the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. ***Id.*** at 544, 543 N.W.2d at 499. Neumeyer explains that he has raised this issue on appeal solely to preserve it for subsequent review in light of the fact that the Wisconsin Supreme Court has accepted the petition for review in ***McMaster***. Following ***McMaster***, we conclude that the criminal prosecution did not violate the Double Jeopardy Clause.

Neumeyer next argues that the request to perform field sobriety tests transforms a ***Terry***[2] investigative stop into an arrest, and therefore probable cause to arrest is required before such a request may lawfully be made. Neumeyer acknowledges that in ***State v. Swanson***, 164 Wis.2d 437, 475 N.W.2d 148 (1991), the supreme court held that a person is not under arrest for Fourth Amendment purposes when he or she is asked to perform field sobriety tests because a reasonable person would not believe that he or she is under arrest after merely being requested to perform field sobriety tests during a routine traffic stop. ***Id.*** at 448, 475 N.W.2d at 153. But, according to Neumeyer, the subsequent case of ***State v. Babbitt***, 188 Wis.2d 349, 525 N.W.2d 102 (Ct. App. 1994), requires a re-examination of ***Swanson***.[3] In ***Babbitt***, we held that a refusal to perform a field sobriety test is not protected by the Fifth Amendment to the United States Constitution and, therefore, the refusal may be used to establish probable cause to arrest for driving while under the influence of an intoxicant. ***Babbitt***, 188 Wis.2d at 362, 525 N.W.2d at 106. Neumeyer argues that a person who is detained is no longer really free to decline to take a field sobriety test

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[2] *See* ***Terry v. Ohio***, 392 U.S. 1 (1968).

[3] We do not understand Neumeyer's argument that we can decide that ***State v. Swanson***, 164 Wis.2d 437, 475 N.W.2d 148 (1991), does not control this case without overruling it. He acknowledges that we cannot overrule ***Swanson***. We do not address this argument in more detail because of our conclusion that ***State v. Babbitt***, 188 Wis.2d 349, 525 N.W.2d 102 (Ct. App. 1994), is not inconsistent with ***Swanson***.

when requested because that refusal may be used as evidence for probable cause to arrest. This "Hobson's choice," according to Neumeyer, transforms a ***Terry*** investigative stop into an arrest as soon as the person who is detained is asked to take a field sobriety test.

There is no merit to Neumeyer's argument. A person is not compelled to submit to field sobriety tests simply because a refusal may be considered as evidence of probable cause to arrest for driving while intoxicated. We did not hold in ***Babbitt*** that refusal alone constitutes probable cause to arrest.[4] ***Babbitt*** is not inconsistent with ***Swanson*** and does not require a re-examination of ***Swanson***. In fact, our discussion and decision in ***Babbitt*** assumes that the request to take field sobriety tests is not an arrest; otherwise, we would not have discussed whether there was probable cause to arrest after the detained person refused to take the field sobriety tests. Following ***Swanson***, we conclude that the request that Neumeyer take field sobriety tests did not transform the ***Terry*** investigative stop into an arrest.

By the Court.—Judgment affirmed.

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

[4] In ***State v. Babbitt***, 188 Wis.2d 349, 525 N.W.2d 102 (Ct. App. 1994), we concluded that there was probable cause to arrest even without consideration of the refusal; but we discussed and decided the permissibility of considering a defendant's refusal to submit to a field sobriety test for purposes of establishing probable cause to arrest because both parties requested that we do so. ***Babbitt***, 188 Wis.2d at 358, 525 N.W.2d at 105.