

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

October 24, 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

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No. 96-0842

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TERRY L. NORDBERG,

Defendant-Appellant.

APPEAL from an order of the circuit court for Monroe County:
STEVEN L. ABBOTT, Judge. *Affirmed.*

VERGERONT, J.¹ Terry L. Nordberg appeals from an order of the trial court finding that his refusal to submit to a blood test for alcohol content was unreasonable. On appeal Nordberg contends that the arresting officer lacked probable cause to believe he was driving while under the influence of alcohol and that the trial court erred in determining that his refusal to submit to a blood test was unreasonable. We reject each contention and affirm.

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

Nordberg was taken by ambulance to Tomah Memorial Hospital from the scene of a one-vehicle accident that occurred on Eagle Drive in Monroe County on the evening of May 27, 1995. Officer Laird Raiten, who was dispatched to the hospital, read Nordberg the Informing the Accused form at the hospital and asked Nordberg to submit to the drawing of blood for chemical testing. Nordberg refused. Raiten gave Nordberg a citation for operating while under the influence, first offense, and a notice of intent to revoke operating privilege based on the refusal. Nordberg timely requested a hearing to challenge the revocation. *Id.* at 3.²

Officer Raiten's testimony at the hearing was as follows. He was informed by Officer Mark Jerdee of the accident while he was on duty. Jerdee was one of the officers at the scene of the accident. Jerdee told Raiten that a pick-up truck had run off the road and struck a tree and Nordberg was being taken from the accident to Tomah Memorial Hospital. Jerdee told Raiten that there was alcohol in the vehicle and cans strewn about, and that the ambulance crew told him (Jerdee) that they had smelled alcohol on Nordberg's breath. Jerdee told Raiten that based on statements made to him at the scene of the accident, Nordberg was driving the vehicle. Jerdee directed Raiten to go to the hospital, check for injuries, get names, dates and addresses and proceed with any OWI violations against Nordberg.

When Raiten arrived at the hospital, he first spoke to James Osmond, a passenger in the vehicle. Osmond told Raiten that it was Nordberg's vehicle and that Nordberg was driving. Raiten asked Osmond whether he (Osmond) was driving the vehicle and Osmond answered, "No, that Terry Nordberg was driving the vehicle." Raiten spoke to Nordberg, who was in the emergency room of the hospital, and told him that he was there to issue him a

² Section 343.305(2), STATS., known as the implied consent law, states that any person who drives a vehicle on the public highways of this state is deemed to have given his consent for chemical testing when requested to do so by a law enforcement officer. A law enforcement officer may request a person to submit to a blood test upon arrest for operating a motor vehicle while under the influence of an intoxicant. Section 343.305(3)(a). The officer must inform the arrestee of the arrestee's implied consent to a test; that if the arrestee refuses the test his license shall be revoked; and that the arrestee may have an additional test performed. Section 343.305(4)(d). If testing is refused, the officer issues a notice of intent to revoke the person's operating privileges, and operating privileges are revoked unless a hearing is requested. Section 343.305(9) and (10).

citation for operating under the influence of alcohol. Nordberg told Raiten that he was not driving. Raiten observed that Nordberg was refusing to stay at the hospital and was not cooperating with the doctors, who felt he had to stay there for treatment.

Raiten read Nordberg the Informing the Accused form paragraph by paragraph, making a check mark by each paragraph as he read it. When he asked Nordberg whether he understood, Nordberg mumbled that he understood. While Raiten read him the form, Nordberg stated several times that he was not driving. After reading the form, Raiten asked whether Nordberg would submit to a chemical evidentiary test of his blood and Nordberg said he would not. Raiten understood at the time that Nordberg had some possible broken ribs and that is why the doctors wanted to keep him there. Raiten did not know what other injuries Nordberg had. Raiten's observation was that Nordberg was being uncooperative with him and the hospital staff. Raiten conceded on cross-examination that it was possible that Nordberg might have been in shock at the hospital. Raiten did not administer any field sobriety tests because of Nordberg's injuries.

On cross-examination, Raiten acknowledged that he did not specifically state in his accident report, made shortly after the accident, that Jerdee told him that Nordberg had smelled of intoxicants at the scene of the accident. But his report did state that Jerdee asked him to go to the hospital and check for injuries and a possible operating a motor vehicle while under the influence. Raiten's report stated that upon his arrival at the hospital, he spoke with the emergency medical team (EMT) who indicated that both Nordberg and Osmond had a strong odor of intoxicants coming from them. The report also stated that, "in speaking with Mr. Nordberg, I couldn't detect if the odor of intoxicants was coming from his breath or the clothing piled in the emergency room."

James Osmond testified that he believed he was involved in a one-car motor vehicle accident on May 27, 1995, but he did not know how the accident occurred. He talked to Nordberg about the accident after Nordberg got out of the hospital and told Nordberg he could not remember anything. Nordberg responded, "Well, I didn't either because I thought I was driving." Osmond testified that he did not know who was driving.

James Dornan testified that he was a passenger in a vehicle owned by Nordberg that was involved in an accident on May 27, 1995. He testified that Osmond was driving. Dornan acknowledged that he had made a written statement on the night of the accident that Nordberg was driving the vehicle, but he said that statement was not true. He could not explain why he said Nordberg was driving. Dornan was "real drunk" at the time of the accident and he was sure all three were intoxicated. He did recall finding Nordberg on the ground after the accident and that Nordberg was unconscious and had a cut above the eye.

Nordberg's wife testified that she came to the hospital shortly after the accident. Nordberg was there when she arrived. Police officers were present talking to the doctor but she did not recall observing anyone talking to her husband while she was there. In her opinion, Nordberg was not "completely there mentally" because her husband had given the police officers an address that she had never heard of, an address in Wilton. She later learned that it was an address where he lived with his mother when he was little. Her observations were that Nordberg was "not acting normal" at the hospital. She had seen him intoxicated before and he did not appear to be intoxicated; he appeared to be in shock. He had fractured ribs, sternum and had a two-inch cut above his eye. He also had problems with his sinus cavity and had a CAT scan later for that reason. Nordberg was transferred from Tomah Memorial Hospital to St. Francis Medical Center and remained in the hospital for about two weeks. His wife testified that he was "basically unconscious for four or five days."

On cross-examination, Nordberg's wife acknowledged that it appeared that he had some alcohol but she thought "he was more in shock than the alcohol." She could not smell intoxicants on his breath. She was with him approximately fifteen minutes and was very upset during that time.

Nordberg testified that he was heavily sedated for four to five days after the accident. He was not sure when he was given sedation--whether it was at Tomah Memorial or St. Francis Hospital. He was not aware of any head injuries except the cut above his eye and the nasal infection. He could not recall anything from the accident on, but he did recall that Osmond was driving because he recalled that he let Osmond drive from Mauston. It was his (Nordberg's) vehicle. He acknowledged that he had had "a few" that evening but he would not say that he was intoxicated. In deciding that Officer Raiten

had probable cause to believe that Nordberg was driving while under the influence, the trial court considered Raiten's testimony that Officer Jerdee had told him there was an odor of alcohol on Nordberg's breath at the scene of the accident; that Nordberg owned the truck; that the truck went off the road and ran into a tree; that there were beer cans in and out of the vehicle; that it was communicated to Raiten that Nordberg was driving; and that the EMTs told Raiten that Nordberg and Osmond had a strong odor of intoxicants coming from them and that Nordberg's injuries matched the damage to the driver's door.

The parties stipulated to the fact that Officer Raiten complied with the informational requirements of the statute. The court also determined there was no dispute that Nordberg refused to permit a blood test.

With respect to whether the refusal was due to a physical inability unrelated to the person's use of alcohol, the court first noted that this was Nordberg's burden to prove. The court found there was no evidence that he was physically unable to submit to a test and found the reason he was in the hospital was probably related to alcohol use. For those two reasons, the court determined that the defendant's refusal was unreasonable.

At a refusal hearing, the issues are limited to:

- a. Whether the officer has probable cause to believe the person was driving or operating a motor vehicle while under the influence of alcohol ... to a degree which renders him or her incapable of safely driving or having a blood alcohol concentration of 0.1% or more and whether the person was lawfully placed under arrest for violation of s. 346.63(1) or a local ordinance in conformity therewith or s. 346.63(2), 940.09 or 940.25.
- b. Whether the officer complied with par. (a).
- c. Whether the person refused to permit the test.

- d. The person shall be deemed not to have refused the test if it is shown by a preponderance of evidence 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, controlled substances or other drugs.

State v. Nordness, 128 Wis.2d 15, 25-26, 381 N.W.2d 300, 304 (1986). Nordberg raises only the first and fourth issues on appeal.

Probable cause exists when the totality of the circumstances within the arresting officer's knowledge at the time of the arrest would lead a reasonable officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant. *Nordness*, 128 Wis.2d at 35, 381 N.W.2d at 308. An officer's belief may be partially predicated on hearsay information and the officer may rely on the collective knowledge of other officers in the department. *State v. Wille*, 185 Wis.2d 673, 683, 518 N.W.2d 325, 329 (Ct. App. 1994).

The State's burden of persuasion at a refusal hearing is substantially less than at a suppression hearing. *Wille*, 185 Wis.2d at 681, 518 N.W.2d at 328. In presenting evidence at a refusal hearing that an officer had probable cause, the State need only show that the officer's account is plausible. *Id.* The State need not show probable cause to a reasonable certainty. *Nordness*, 128 Wis.2d at 36, 381 N.W.2d at 308. The trial court does not weigh the evidence between the parties but simply determines whether or not the officer's account is plausible. *Id.*

We conclude that the totality of circumstance within Officer Raiten's knowledge at the time of the arrest would lead a reasonable officer to believe that Nordberg was operating the truck and was under the influence of alcohol while doing so.

Raiten had several pieces of information that made it reasonable to believe Nordberg had been driving. Officer Jerdee told him that a passenger in the vehicle said Nordberg was driving. Osmond told Raiten that Nordberg was driving and that it was Nordberg's vehicle. According to Raiten's police report, the EMT who had transported Nordberg from the accident to the hospital told

Raiten that the driver's door was smashed in and this corresponded to Nordberg's injuries. Raiten did not have to accept Nordberg's denial that he was the driver when there was information indicating that he was. See *State v. Tompkins*, 144 Wis.2d 116, 125, 423 N.W.2d 823, 827 (1988). The later testimony of Dornan and Osmond contradicting their statements on the night of the accident is not pertinent to our inquiry: we are concerned with the information Raiten had at the time of the arrest.

We also conclude that Raiten could reasonably believe that Nordberg had been under the influence of an intoxicant while driving. Raiten knew the circumstances of the accident--that the truck had driven off the road and hit a tree. From this a reasonable officer could believe the driver was inattentive or impaired. Raiten knew from Jerdee that the EMT at the scene of the accident had smelled intoxicants on Nordberg's breath. According to Raiten's police report, the EMT also told him at the hospital that there was a very strong odor of alcohol coming from both Nordberg and Osmond.

Nordberg emphasizes that on cross-examination Raiten acknowledged the statement in his report that "he could not detect if the odor of intoxicants was coming from Nordberg or the clothing piled in the emergency room." This statement does not mean, however, that Raiten did not detect the odor of intoxicants or that he smelled the odor from another source: it means only that Raiten could not himself verify that the odor of intoxicants was coming from Nordberg. However, Raiten did not need to verify it personally because he could rely on what the emergency medical team and Officer Jerdee had told him.

We now consider whether Nordberg has shown by a preponderance of the evidence that his refusal to submit to the blood test was due to a physical inability to submit to the test due to a physical disability or disease unrelated to the use of alcohol. We do not reverse the findings of the trial court, sitting as the trier of fact on this issue, unless the findings of fact are clearly erroneous. See *State v. Jackson*, 147 Wis.2d 824, 829, 434 N.W.2d 386, 388 (1989).

The court found that Nordberg was not physically unable to submit to a blood test. This finding is supported by the record. There is no evidence that Nordberg was unable to have blood drawn from his arm due to a

physical inability. It appears his argument is that he was not sufficiently lucid to understand what was being asked. However, Raiten's testimony is evidence that Nordberg was conscious and able to understand and to communicate when Raiten asked him to submit to the test. The trial court chose to credit Raiten's testimony over Nordberg's vague testimony that he could not remember anything after the accident or remember when he was sedated, and over Nordberg's wife's testimony that Nordberg was in shock at the hospital and was unconscious for four or five days after the accident. When the trial court sits as the finder of fact, it is the arbiter of the credibility of witnesses and the weight to be given witnesses. *Gehr v. City of Sheboygan*, 81 Wis.2d 117, 122, 260 N.W.2d 30, 33 (1977).

There was no medical evidence that any of Nordberg's injuries caused shock or caused him to be unable to understand what Raiten was asking him. There was evidence that he had consumed alcohol. The trial court properly determined that Nordberg did not meet the burden necessary to overcome the fact of his refusal to submit to the test.

By the Court. – Order affirmed.

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