COURT OF APPEALS
DECISION
DATED AND RELEASED

December 12, 1996

NOTICE

No. 96-1202

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

VILLAGE OF OREGON,

Plaintiff-Respondent,

v.

MARK A. FEILER,

Defendant-Appellant.

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

DYKMAN, P.J. This is a single-judge appeal decided pursuant to § 752.31(2)(c), STATS. Mark A. Feiler appeals from a circuit court order affirming a Village of Oregon Municipal Court decision. The municipal court found Feiler guilty of operating a motor vehicle with a prohibited blood alcohol level (BAC), operating a motor vehicle while under the influence of an intoxicant (OMVWI), and disorderly conduct. During trial, the court ruled that the results of Feiler's intoxilyzer test were entitled to automatic admissibility. The court also considered Feiler's refusal to perform field sobriety tests as evidence of his

guilt. Feiler challenges the admission of this evidence. We conclude that the court properly admitted this evidence and therefore affirm.

BACKGROUND

On May 6, 1995, at 1:35 a.m., Officer Paul Rink stopped Feiler's vehicle for speeding. When Officer Rink approached Feiler's vehicle and requested his driver's license, he noticed an odor of intoxicants on Feiler's breath. Pursuant to Officer Rink's request, Feiler exited his car, placing his left hand on the driver's side door and his right hand on the roof of the vehicle. As Feiler walked to the back of his vehicle, Officer Rink observed him sway from side to side. Officer Rink explained several different field sobriety tests to Feiler. Feiler refused to perform any of the tests, stating that all he wanted was a breathalyzer test. Officer Rink administered a preliminary breath test to Feiler, which registered .10. Feiler was placed under arrest for OMVWI and taken to the police station.

At the police station, Officer Rink read the Informing the Accused form to Feiler. The form read to Feiler stated:

> If you have a prohibited alcohol concentration or you refuse to submit to chemical testing and you have two or more prior suspensions, revocations or convictions within a *five year period* which would be counted under s. 343.307(1) Wis. Stats., a motor vehicle owned by you may be equipped with an ignition interlock device, immobilized or seized and forfeited.

(Emphasis added.) Effective April 30, 1994, however, § 343.305(4), STATS., was amended, and the period during which prior offenses are to be considered was expanded to ten years.

Feiler agreed to submit to an intoxilyzer test, which was then administered by Officer James Bowen. The result of the test was .11, and Feiler was issued citations for BAC and OMVWI.

At a September 19, 1995 trial, the municipal court found Feiler guilty of BAC, OMVWI, and disorderly conduct. During trial, the court found that Officer Rink substantially complied with Wisconsin's implied consent law prior to asking Feiler to submit to the intoxilyzer test, and therefore the results of the test were entitled to automatic admissibility. The court also considered Feiler's refusal to perform field sobriety tests as evidence of his guilt.

Feiler appealed the municipal court decision to the Dane County Circuit Court pursuant to § 800.14, STATS. The circuit court affirmed, and Feiler appeals.

INFORMING THE ACCUSED FORM

In ***State v. Zielke***, 137 Wis.2d 39, 403 N.W.2d 427 (1987), the supreme court held that "[i]f the procedures set forth in § 343.305, Stats., are not followed the State not only forfeits its opportunity to revoke a driver's license for refusing to submit to a chemical test, it also loses its right to rely on the automatic admissibility provisions of the law, sec. 343.305(7)." ***Id.*** at 49, 403 N.W.2d at 431. Feiler argues that Officer Rink, when he read the outdated Informing the Accused form, failed to comply with the provisions of the implied consent law and lost the presumption of automatic admissibility of the results of the intoxilyzer test. Therefore, Feiler argues, the court erred when it admitted the result of the intoxilyzer test without expert testimony to establish a foundation for its admission.

Because the officer substantially complied with the provisions of the implied consent law, we reject Feiler's argument. In ***State v. Sutton***, 177 Wis.2d 709, 503 N.W.2d 326 (Ct. App. 1993), we held that so long as an officer's misstatement did not prejudice the accused's decision to submit to or refuse testing, the officer had substantially complied with § 343.305(4), STATS. ***Id.*** at 715, 503 N.W.2d at 328. Substantial compliance is "actual compliance in respect to the substance essential to every reasonable objective of the statute." ***State v. Muente***, 159 Wis.2d 279, 281, 464 N.W.2d 230, 231 (Ct. App. 1990). The implied consent warnings are designed to inform drivers of the rights and penalties *applicable to them*. ***County of Ozaukee v. Quelle***, 198 Wis.2d 269, 279, 542 N.W.2d 196, 199 (Ct. App. 1995).

The provision of the implied consent law that was misstated on the form read to Feiler related to persons with prior convictions for driving while intoxicated. However, this was Feiler's first offense. Feiler failed to present any evidence as to how his decision to submit to or refuse testing was prejudiced by the misstatement. Given the lack of evidence of prejudice and the fact that Feiler was properly informed of all provisions that were applicable to him, the officer substantially complied with the implied consent law. Therefore, the results of the intoxilizer test were automatically admissible under § 343.305(5)(d), STATS.

Feiler attempts to distinguish the "substantial compliance" cases on the ground that they were refusal cases and did not address the question of automatic admissibility of test results. We are not persuaded. If substantial compliance is sufficient to invoke the revocation provisions of the implied consent law for refusal to submit to testing, we see no reason why substantial compliance should not be sufficient to invoke the automatic admissibility provisions. The trial court did not err in admitting the results of the intoxilyzer test.

REFUSAL TO PERFORM FIELD SOBRIETY TESTS

Feiler also argues that the trial court erred in receiving evidence of his refusal to perform field sobriety tests. In ***State v. Babbitt***, 188 Wis.2d 349, 525 N.W.2d 102 (Ct. App. 1994), we held that evidence of a defendant's refusal to submit to field sobriety tests was admissible at a probable cause hearing. We said, "In the interest of clarity, we note that our conclusion should not be construed to mean that a defendant's refusal to submit to a field sobriety test may be used as evidence at trial." ***Id.*** at 363, 525 N.W.2d at 107. Feiler argues that this statement must be construed as not permitting a prosecutor to use such evidence at trial.

The question of whether the court properly considered Feiler's refusal to perform field sobriety tests raises the issue of whether Feiler had a constitutionally protected right to refuse to perform the tests. It is unclear from Feiler's argument whether he is claiming a constitutionally protected right under the Fourth or Fifth Amendment to the United States Constitution. Feiler argues that just as a defendant has a right to remain silent and that silence cannot be commented upon at trial, so too a defendant has a right not to

cooperate with an officer during an investigative or "***Terry***-stop."[1] He concludes that non-cooperation cannot be considered at trial. However, Feiler's arguments are not supported by case law.

Feiler was pulled over as a result of a routine traffic stop. Such a stop, while a seizure under the Fourth Amendment, is not an arrest, but an investigative or "***Terry***-stop." *See* ***County of Dane v. Campshure***, 204 Wis.2d 27, 30-31, 552 N.W.2d 876, 877 (Ct. App. 1996). In ***Campshure***, we held that when an officer has reasonable suspicion that a driver is intoxicated, a request to perform field sobriety tests is reasonably related in scope to the purposes of the stop and does not convert a traffic stop into an arrest. 204 Wis.2d at 32, 552 N.W.2d at 878.

Feiler argues that during a "***Terry***-stop," the suspect has no obligation to cooperate with the officer. However, the language Feiler cites from ***Florida v. Royer***, 460 U.S. 491 (1983), is part of the Court's discussion of the rights of a person approached by an officer who has no reasonable suspicion of wrong-doing. The statement does not refer to a suspect's rights or duties during the course of a "***Terry***-stop." *See* ***id.*** at 497-498. The Court acknowledges that "reasonable suspicion of criminal activity warrants a temporary seizure for the purposes of questioning limited to the purposes of the stop." ***Id.*** at 498.

We have already determined that when an officer has reasonable suspicion that a suspect is intoxicated, a request to perform field sobriety tests is reasonably related in scope to the purposes of the stop. ***Campshure***, 204 Wis.2d at 32, 552 N.W.2d at 878. The question of whether reasonable suspicion exists is a question of law which we review *de novo*. ***State v. Krier***, 165 Wis.2d 673, 676, 478 N.W.2d 63, 65 (Ct. App. 1991). "The question of what constitutes reasonable suspicion is a common sense test. Under all the facts and circumstances present, what would a reasonable police office reasonably suspect in light of his or her training or experience?" ***State v. Jackson***, 147 Wis.2d 824, 834, 434 N.W.2d 386, 390 (1989).

Officer Rink stopped Feiler's automobile because he was speeding, and in the course of his investigation, the officer noticed a strong odor of intoxicants and observed Feiler sway from side to side as he walked. Under

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

these circumstances, Officer Rink had a reasonable suspicion that Feiler was intoxicated. Therefore, the officer's request that Feiler submit to field sobriety tests was reasonable. There was no Fourth Amendment violation that would prohibit introduction of evidence at trial of Feiler's refusal to perform field sobriety tests.

While a driver does have a constitutional right not to answer an officer's questions during a traffic stop, there is no constitutionally protected right not to perform field sobriety tests. The United States Supreme Court has held that there is no constitutional right to refuse to submit to blood alcohol testing. ***South Dakota v. Neville***, 459 U.S. 553 (1983). The Court stated that the Fifth Amendment is designed to prohibit the use of physical or moral compulsion and that the values behind the Fifth Amendment are not hindered when the State offers a suspect the choice of submitting to a blood alcohol test or having a refusal used against him or her. ***Id.*** at 562-63. The Court held that "a refusal to take a blood-alcohol test, after a police officer has lawfully requested it, is not an act coerced by the officer, and thus is not protected by the privilege against self-incrimination." ***Id.*** at 564.

We have reached the same conclusion with respect to a refusal to submit to field sobriety testing: "Like an Intoxilyzer test, suspects also have no fifth amendment right to refuse to perform a field sobriety test." ***State v. Babbitt***, 188 Wis.2d 349, 361, 525 N.W.2d 102, 106 (Ct. App. 1994). We held that a refusal to perform a field sobriety test is not compelled in violation of the Fifth Amendment because the suspect is not required to perform the test. ***Id.*** at 361-62, 525 N.W.2d at 106. And just as a refusal to take an intoxilyzer test is relevant evidence of consciousness of guilt, so too is the refusal to perform a field sobriety test. ***Id.*** at 359, 525 N.W.2d at 105.

There are no Fourth or Fifth Amendment protections which bar the admission at trial of evidence of refusal to submit to field sobriety testing. As the supreme court noted in ***State v. Crandall***, 133 Wis.2d 251, 259, 394 N.W.2d 905, 908 (1986), "The person who cooperates by taking the breathalyzer test will have the result presented at trial. In fairness to those defendants, we do not believe the defendant who refuses to take the test should have no mention of that made at trial." The same policy of not wanting to give suspects an incentive to refuse to submit to breathalyzer tests also applies to field sobriety testing. Therefore, the trial court did not err in considering evidence of Feiler's refusal to submit to field sobriety testing as evidence of consciousness of guilt.

By the Court.—Order affirmed.

Not recommended for publication in the official reports. *See* RULE 809.23(1)(b)4, STATS.