

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

November 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. 96-1266

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TIMOTHY S. KUKLINSKI,

Defendant-Appellant.

APPEAL from an order of the circuit court for Dane County: P. CHARLES JONES, Judge. *Affirmed.*

ROGGENSACK, J. Timothy S. Kuklinski appeals an order revoking his driver's operating privileges for refusing to submit to breath testing. The issues on appeal are (1) whether the state lawfully arrested Kuklinski for driving under the influence of an intoxicant; (2) whether the state provided Kuklinski with the information required by § 343.305(9)(a)5.b., STATS.; and (3) whether Kuklinski improperly refused to submit to breath testing. Because this court¹ concludes that Kuklinski was lawfully arrested, that the state

¹ This appeal is decided by one judge pursuant to § 757.31(2)(c), STATS.

provided all information required by statute, and that Kuklinski improperly refused to submit, the order is affirmed.

BACKGROUND

Madison Police Officer John Radovan was dispatched to the scene of a two-car accident on November 5, 1995, at approximately 3:55 p.m. Upon his arrival, Radovan spoke with Ronald Raemisch, who told the officer that his car had been rear-ended. While Radovan was speaking with Raemisch, Kuklinski approached him and said that Raemisch had cut in front of him, braked quickly and caused the accident. Radovan observed Kuklinski had very bloodshot eyes, slurred his words, walked with an unsteady gait and was unable to control his anger.

Radovan normally asks both drivers at an accident scene to wait in the back of his squad car while he sorts things out. However, because Kuklinski seemed so angry, Radovan separated the drivers to avoid an altercation. He asked Kuklinski to sit in the back of the squad car and Raemisch to sit in the back of his own vehicle.

When Radovan began questioning Kuklinski, he detected a strong odor of intoxicants on his breath. Radovan asked whether Kuklinski had been drinking. Kuklinski initially denied it, but when Radovan told Kuklinski he smelled like alcohol, Kuklinski admitted having two beers. After Radovan gave Kuklinski several field sobriety tests, Radovan arrested Kuklinski for operating a motor vehicle while under the influence of an intoxicant and transported him to the Dane County Public Safety Building.

At the Safety Building, Radovan issued Kuklinski a citation for operating a motor vehicle while intoxicated and then reviewed the Informing the Accused form with him. Radovan asked Kuklinski to take a breath test. Initially, he refused, but after he was told that his license would be revoked if he continued to refuse, he agreed to blow into the machine. His breath samples

were inadequate and he was asked to give additional breath samples. He refused again.

At the refusal hearing, Kuklinski challenged the legality of Radovan's request that he wait in the back of the squad. Once in the squad, Kuklinski would not have been able to leave, because the squad's back seat doors would not open from the inside. Kuklinski also alleged the statutorily required information had been given too late and therefore, he had not improperly refused to be tested.

The trial court held Radovan had reasonable suspicion to detain Kuklinski for field sobriety tests, and after the completion of those tests, there was probable cause to lawfully arrest him for driving under the influence. The trial court also found that Kuklinski was informed that refusing to submit to a breath test would result in license revocation; that he had refused to provide two separate, adequate breath samples, as required by statute; and therefore, he had improperly refused to submit.

The trial court's factual findings and legal conclusions are fully supported by the record and the law. Therefore, the order is affirmed.

DISCUSSION

Scope of Review.

This court will determine *de novo* whether undisputed facts show probable cause. *State v. Babbitt*, 188 Wis.2d 349, 356, 525 N.W.2d 102, 104 (Ct. App. 1994). Statutory construction presents a question of law; therefore, this court reviews whether the state fulfilled the requirements of § 343.305(9)(a)5.b., STATS., *de novo*. *Behnke v. Behnke*, 103 Wis.2d 449, 452, 309 N.W.2d 21, 22 (Ct. App. 1981). However, factual findings of the trial court, such as the occurrence or sequence of certain events, will be upheld unless they are clearly erroneous. See § 805.17(2), STATS.

The Refusal Hearing.

The issues which are determined at a refusal hearing are limited, as established by § 343.305(9)(a)5. That section states in material part:

The issues of the hearing are limited to:

- a. Whether the officer had probable cause to believe the person was driving or operating a motor vehicle while under the influence of alcohol ... or a degree which renders the person incapable of safely driving ... and whether the person was lawfully placed under arrest for violation of § 346.63(1)
- b. Whether the officer complied with sub. (4) or both subs.(4) and (4m).
- c. Whether the person refused to permit the test

At a refusal hearing, in terms of the probable cause inquiry, the trial court must simply ascertain the plausibility of the police officer's account in regard to his belief that there was probable cause to arrest the defendant for driving a motor vehicle while intoxicated. A refusal hearing is not a forum to weigh the state's and the defendant's evidence. *State v. Nordness*, 128 Wis.2d 15, 36, 381 N.W.2d 300, 308 (1986), citing *Virgil v. State*, 76 Wis.2d 133, 144, 250 N.W.2d 378, 384 (1977). "Probable cause exists where the totality of the circumstances within the arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe ... that the defendant was operating a motor vehicle while under the influence of an intoxicant." *Nordness*, 128 Wis. at 35, 381 N.W.2d at 308.

Kuklinski argues he was arrested when he was asked to sit in the squad, and that arrest was unlawful because there was not probable cause at that point in time. He does not dispute that after he had failed the field sobriety

tests, Radovan had probable cause to arrest him. At a refusal hearing, the state must demonstrate that probable cause to arrest existed before a chemical test was requested. There is no dispute that that occurred here.

Prior to arrest, an officer may detain an individual, if he has a reasonable suspicion which is based on specific, articulable facts and reasonable inferences from those facts, that the individual has broken a law. *State v. Griffin*, 183 Wis.2d 327, 330-31, 515 N.W.2d 535, 537 (Ct. App. 1994). Before he asked Kuklinski to sit in the squad, Radovan noted that Kuklinski had been involved in an automobile accident and had an unstable gait, bloodshot eyes, slurred speech and an inability to control his anger. Those facts were sufficient to give Radovan reasonable suspicion to believe that Kuklinski had broken the law. Additionally, based on Radovan's request, Kuklinski had no reason to believe he was then under arrest for driving under the influence. Both drivers were detained, while Radovan proceeded to investigate the accident. There was no testimony that Kuklinski had not gone to the squad car voluntarily or that he tried to open the rear door and found he could not.

When Radovan returned to the squad, he asked Kuklinski if he had been drinking. Kuklinski responded that he had had two beers. Thereafter, Radovan conducted field sobriety tests and then placed Kuklinski under arrest. The trial court was correct in concluding that under the totality of circumstances a reasonable officer would have believed that Kuklinski had been driving his vehicle while under the influence of an intoxicant. Therefore Kuklinski's arrest was lawful.

In addition, Kuklinski argues that the state did not meet its obligation under § 343.305(9)(a)5.b., STATS. Kuklinski does not claim that he was not given the information required by §§ 343.305(4) and (4m), STATS. He acknowledges Radovan read him the Informing the Accused form, which provides the requisite statutory information. However, he argues that because the information was read to him after he initially refused, it was insufficient. He attaches much significance to the fact that the Notice of Intent to Revoke form has a time of 5:15 p.m. noted on it and the Informing the Accused form has a

time of 5:16 p.m. noted on it. In other words, he argues that his "refusal" was invalid because it was uninformed.

The state must show that the officer provided the information required by § 343.305(4) and/or (4m), and that the driver refused to permit the test. Two police officers testified that Kuklinski was given the requisite information before the breathalyzer test was attempted. The trial court found that the attempts occurred between 5:24 and 5:36 p.m. The trial court's factual findings are not clearly erroneous; and therefore, they are sustained. We conclude that the state fulfilled its obligation to provide² all information required by statute.

Kuklinski also argues that his conduct was not sufficient to conclude that he had refused to take the requested test. The process of chemical testing is not a game. Declining to affirmatively consent to testing in a meaningful way is a refusal. *State v. Luedke*, No. 96-1124 (Wis. Ct. App. Oct. 15, 1996).³ The statute clearly states that the "failure to provide 2 separate, adequate breath samples in the proper sequence constitutes a refusal." Section 343.305(6)(c)3., STATS.

The trial court found that when Kuklinski was asked to take a breathalyzer test, initially he refused. But after talking with the officers further, he appeared to agree. A breathalyzer test was attempted, but Kuklinski provided deficient samples. When he was requested to provide additional breath samples, he refused. The factual findings and legal conclusions of the trial court have adequate support in the record and in the law. Kuklinski's conduct was not sufficient to satisfy the statutory requirement that adequate breath samples be provided. Kuklinski improperly refused to be tested.

² In so concluding, we do not decide whether the exact time when the information was provided is material.

³ Recommended for publication, pursuant to § 809.23, STATS.

CONCLUSION

Kuklinski was lawfully arrested for a violation of § 346.63(1)(a), STATS., before he was asked to submit to a breath test. Reading the Informing the Accused form satisfied the state's obligation to provide information and Kuklinski improperly refused to give a sufficient sample for the breathalyzer.

By the Court.--Order affirmed.

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