COURT OF APPEALS DECISION DATED AND RELEASED

February 20, 1997

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. 96-2281-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DALE W. ROBINSON,

Defendant-Appellant.

APPEAL from an order of the circuit court for Marquette County: RICHARD O. WRIGHT, Judge. *Affirmed*.

VERGERONT, J.[1] Dale Robinson appeals the trial court's order revoking his operating privileges after Robinson refused to submit to chemical testing. Robinson contends that the officer did not have probable cause to arrest him for driving while under the influence of an intoxicant at the time the officer requested Robinson to submit to chemical testing. We conclude there was probable cause to arrest Robinson and we therefore affirm.

---

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

BACKGROUND

At the refusal hearing, the State's sole witness was Les Crandall, deputy sheriff for Marquette County. He testified as follows. While on duty on February 16, 1996, at approximately 2:00 a.m. he observed a van driving with a headlight out. He pulled the van over and identified the driver as Dale Robinson. Crandall observed that Robinson's speech was slow and slurred, his eyes were bloodshot and glassy, and Crandall smelled intoxicants on Robinson's breath. Crandall asked Robinson if he had been drinking and Robinson said he had a couple of beers after work.

Crandall then asked Robinson to perform field sobriety tests. Crandall observed that Robinson had trouble unfastening his seat belt to get out of the van. When Robinson got out of the van, Crandall noticed that he was a little bit off balance when he walked.

Crandall first asked Robinson to perform the horizontal gaze and nystagmus [HGN] test, which involved Robinson tracking with his eyes. Crandall observed a lack of smooth pursuit in both eyes and nystagmus (a rapid involuntary oscillation of the eyeball) at maximum deviation in both eyes and an onset of nystagmus prior to forty-five degrees in both eyes.

Robinson then performed the walk and turn test, after Crandall demonstrated how to do it and instructed Robinson. In administering this test, Crandall looks to see if the person takes nine heel-to-toe steps as instructed, stays on the line, turns correctly and is able to keep his or her balance. Crandall asked Robinson to remain in a heel-to-toe stance while Crandall demonstrated and instructed. Robinson was not able to do remain in the heel-to-toe stance. Robinson took eighteen to nineteen heel-to-toe steps each way in performing the test. Crandall instructed Robinson to turn by pivoting on his lead foot and taking small steps with his other foot. Robinson did not do that but instead spun on his lead foot without taking steps with his other foot. Robinson did not stay on the line he was instructed to walk on but stepped off the line on step two.

The next test was the one-leg stand. In this test the subject is to raise a foot and keep it raised while counting to thirty and is not to hop or sway or raise the arms. Robinson put his raised foot down on the count of one and started over. Crandall had instructed Robinson to continue, rather than start over.

Robinson then submitted a breath sample for the preliminary breath test (PBT), and the result was .12. At that point Crandall formed the opinion that Robinson was operating under the influence of an intoxicant and placed Robinson under arrest. Crandall handcuffed Robinson, searched him, and placed him in the back of the squad car. By that time another officer had arrived. Crandall found a brown wallet lying on the ground next to the van, which he gave to Robinson, and during a search of the van found a beer bottle between the driver's seat and the passenger's seat with a bit of liquid that smelled of alcohol.

Crandall transported Robinson to the police station where he issued Robinson a citation for operating while under the influence of an intoxicant, second offense, in violation of § 346.63(1)(a), STATS., and a citation for having open intoxicants in a vehicle. Crandall read Robinson a document entitled: "Informing the Accused" which explains the requirements for submitting to a chemical test under Wisconsin's implied consent law.[2] Crandall

---

[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. Section 343.305(2) requires law enforcement to provide at its expense at least two of three approved tests to determine the presence of alcohol in the breath, blood or urine of a suspected intoxicated driver. ***State v. Stary***, 187 Wis.2d 266, 269, 522 N.W.2d 32, 34 (Ct. App. 1994). Law enforcement may designate one of those two as its primary test. ***Id.*** Once a person consents to the primary test, the person is permitted, at his or her request, the alternate test the agency chooses, at the agency's expense, or a reasonable opportunity to a test of the person's choice at the person's expense. ***Id.*** at 270, 522 N.W.2d at 34. 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).

initialed each statement in Section A of the document after he read it to Robinson.[3]

When Crandall asked Robinson if he would submit to a chemical test of his breath, Robinson stated he wanted a blood test. Crandall explained that Robinson first had to submit to the department's primary test, the breath test, and Robinson repeated that he wanted a blood test. After Crandall told Robinson at least one more time that he needed to take the primary test first, Robinson said he was not going to make any more statements, he wanted an attorney, and he was going to remain silent. Crandall told Robinson that he was going to take Robinson's silence as a refusal, and Robinson did not respond. Crandall took Robinson's silence as a refusal and issued Robinson a notice of intent to revoke operating privileges.

Robinson also testified at the refusal hearing. He had been to the dentist earlier on the day he was stopped by Crandall, had a tooth pulled, and had cotton in his mouth. He recalled performing the HGN test, the walk and turn test, the one-leg stand and the PBT test. On the walk and turn test, he took eighteen steps rather than nine because of a misunderstanding, and he was walking on any line he could see. He wanted a blood test rather than a breath test because he had already taken the PBT and he knew he blew a .12. He never said "no" to an intoxilizer breath test at the station, he just stated that he wanted a blood test. After Crandall read the "Informing the Accused" document to him, he understood that he had already taken a breath test, the PBT, and that he could have another type of test. He did not recall whether Crandall told him at the station that he had to take a breath intoxilizer test at the station before he could have a blood test.

The court concluded that Crandall had probable cause to believe that Robinson was operating under the influence of an intoxicant and found that Robinson did refuse to submit to a chemical test after Crandall read the "Informing the Accused" form to him and after Crandall explained that his silence would be considered a refusal. Robinson does not challenge on appeal

---

[3] Crandall testified that he did not read the statements in Section B to Robinson because those apply only to a person with commercial motor vehicle operating licenses and Crandall determined that Robinson did not have one.

the trial court's determination that he refused to submit to a chemical test after being properly informed.

DISCUSSION

Before a person's operating privileges can be revoked for refusing to submit to a chemical test, there must be probable cause to believe that the person was driving while under the influence of an intoxicant. Section 343.305(9)(a)5.a, STATS. Robinson argues that probable cause was lacking for three reasons. We understand Robinson's first contention as follows: Although Crandall did have a reasonable suspicion of a traffic violation--a non-functioning headlight--to stop Robinson such that the initial stop did not violate ***Terry v. Ohio***, 392 U.S. 1 (1968), that reasonable suspicion did not justify Crandall in asking Robinson to perform field sobriety tests. Therefore, the information that Crandall gathered as a result of the field sobriety tests could not be used as a basis for asking Robinson to submit to a PBT or for probable cause.

We consider this argument close to frivolous, if not frivolous. In determining whether an officer has reasonable suspicion, we consider all the specific and articulable facts together with the rational inferences from those facts. *See* ***Terry***, 392 U.S. at 21. 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. ***State v. Jackson***, 147 Wis.2d 824, 834, 434 N.W.2d 386, 390 (1989).

Once Crandall stopped Robinson for the broken headlight, he observed Robinson to have slow and slurred speech, glassy and bloodshot eyes, and an odor of intoxicants on his breath. Those observations are specific and articulable facts, and those facts and the rational inferences from those facts are sufficient to reasonably warrant further investigation to determine whether Robinson was driving while under the influence of an intoxicant. Crandall's question whether Robinson had been drinking was therefore proper, and upon the answer that he had been drinking, the request to perform field sobriety tests was also proper. Even though there might be explanations for bloodshot eyes and slurred speech other than being under the influence of an intoxicant, the

inference from those facts that Robinson was under the influence of an intoxicant is nevertheless a rational inference. *See* ***Jackson***, 147 Wis.2d at 835, 434 N.W.2d at 391.

Robinson next argues that the field sobriety tests violated the protections of ***Terry*** because, even if Crandall were justified in investigating further to determine if Robinson was driving while under the influence, the State did not prove that the field sobriety tests were pertinent to that inquiry. According to Robinson, the State must present an expert opinion that the results of the test are probative of intoxication and Crandall's testimony did not suffice.

Robinson presents no authority for this argument. Crandall testified that he had been employed as a deputy sheriff for four years, and that before he arrested Robinson, he had training in the detection of potentially intoxicated drivers at the academy and had specialized training in the standardized field sobriety tests. Crandall had experience in arresting persons for driving while intoxicated, having arrested approximately seventy to seventy-five persons for that offense. This is sufficient evidence, coupled with Crandall's description of the tests he asked Robinson to perform, to establish that performance of the tests would provide information pertinent to determining whether Robinson was intoxicated. We conclude that the tests were reasonable investigatory tools to either dispel or confirm Crandall's reasonable suspicion that Robinson was intoxicated. *See* ***Terry***, 392 U.S. at 22.

Robinson's third argument is closely related to the second. He contends that the State did not establish that the officer's observations of Robinson's performance on the field sobriety tests were indicative of an impaired ability to drive. We reject this argument.

Probable cause exits when the totality of the circumstances within the officer's knowledge would lead a reasonable officer to believe that the individual was operating a motor vehicle while under the influence of an intoxicant. ***State v. Nordness***, 128 Wis.2d 15, 35, 381 N.W.2d 300, 308 (1986). Probable cause is judged by the factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act. ***State v. Truax***, 151 Wis.2d 354, 360, 444 N.W.2d 432, 435 (Ct. App. 1989).

Crandall's testimony was sufficient to establish that Robinson's performance on the field sobriety tests provided a reasonable basis for believing that Robinson's ability to drive was impaired by reason of intoxication. Robinson was not able to maintain his balance in a heel-to-toe stance, was not able to walk on the line, was not able to do the one-legged stand without starting over and did not follow instructions in several instances in spite of explanation and demonstration. These facts give rise to a reasonable inference that Robinson's ability to maintain his balance and to pay attention were impaired. It is common knowledge, and certainly well within the knowledge of a police officer with Crandall's training and experience, that intoxication impairs one's ability to balance and one's ability to pay attention. A reasonable and prudent officer would know that a person who could not keep his or her balance or follow instructions on the tests is more likely to be under the influence of intoxicants than one who could do those things. It is also common knowledge that an inability to control and coordinate one's physical movements and to pay attention impairs one's ability to properly drive a vehicle. A reasonable and prudent officer would know that a person who performed as Robinson did on the tests was more likely to have an impaired ability to drive than a person who was able to follow instructions and did not lose his or her balance while performing the tests.

We conclude that the results of the field sobriety tests together with Crandall's other observations of Robinson, which we have recited above, establish that Crandall had probable cause to believe that Robinson was driving while under the influence of an intoxicant. The revocation of operating privileges was therefore proper.

By the Court.—Order affirmed.

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