

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 29, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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.

No. 98-1253

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

LYNNE LAYBER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
JEAN W. DiMOTTO, Judge. *Affirmed.*

CURLEY, J.¹ Lynne Layber appeals from an order finding her refusal to submit to a breath test improper under § 343.305, STATS. Layber claims the trial court erred in finding the refusal improper because: (1) the State failed to prove that the arresting officer had reasonable suspicion to stop her; (2) that there

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

was not probable cause to arrest her; and (3) rebuttal testimony was improper and substantially prejudiced Layber. We affirm.

I. BACKGROUND.

In ordering that the refusal was improper, the trial court made the following findings of fact which we adopt in our recitation of the facts:

On December 4, 1997, just after eleven o'clock p.m., Officer Drzewiecki of the Milwaukee County Sheriff's department was patrolling Interstate 94 westbound in the City and County of Milwaukee.... She spotted a dark car driving westbound on I-94 deviating between two lanes.... The car driven by the defendant, the officer was following, left I-94 at that [zoo] interchange and took ... State Highway 45 northbound on her way home to Menomonee Falls from downtown Milwaukee where she had been at the Milwaukee Athletic Club.

Officer Drzewiecki activated her lights and Ms. Layber promptly and at her first opportunity stopped in a safe manner by exiting the first exit off that interchange ... and stopped at the top of the exit ramp Officer Drzewiecki approached [Layber] in her car and asked her ... to produce her driver's license. In response to that, she made observations, from an olfactory point of view, that there was a strong odor of alcoholic beverages on Ms. Layber's breath, that she spoke in slurred speech and that it took her some time to find her license, which was in a small wallet within her purse. She had trouble accomplishing that task. Decided [sic] not to further try to retrieve it, and then again did look for it further, and was able to get it out of that wallet and produce it for the officer.

Three field sobriety tests were administered at the scene. The first was the ABC's, reciting them. They were recited correctly by Ms. Layber. Although her speech was slurred as she recited them.

The finger to nose test was administered as the second field sobriety test. Ms. Layber's right index finger reached the right side of her nose instead of the tip of her nose ... [and] the fingernail of her left index finger arrived under the tip of her nose. She was swaying when she performed that test.

The third and final field sobriety test that was administered was the heel to toe test. Both directions of taking that test she took the correct number of steps[, although she incorrectly placed her feet in terms of crossing them as well as having gaps between the heel and the toe on the initial steps, and again crossed them, her feet, on some steps on the way back.

She was arrested at the scene for operating while under the influence of an intoxicant.

The trial court later found that Layber was then taken to the nearest Sheriff's substation. There, Layber was asked to submit to a breath test for purposes of measuring her alcohol consumption which she continuously refused. Pursuant to § 343.305(9), STATS., after a person refuses such a test, "the law enforcement officer shall immediately take possession of the person's license and prepare a notice of intent to revoke." This was done by the arresting officer and Layber subsequently exercised her right to request a hearing to determine whether her refusal was proper.

Layber's refusal hearing was held on February 20, 1998. At the hearing, Officer Drzewiecki testified as the State's only witness in its case-in-chief to the events leading to Layber's arrest and to Layber's actions in the substation when she refused to take the test. The officer had difficulty recalling the events at the substation. Layber testified on her own behalf claiming never to have been properly advised of her rights concerning the taking of the test. The State then called Officer Hillman as a rebuttal witness. Hillman was the officer who would have administered the breath test. He gave a detailed account indicating that Layber was properly advised of her rights under the refusal law. The trial court later found that Layber was properly read the "informing the accused" form, but when asked if she understood each paragraph, she responded in a belligerent manner that she was a lawyer and she knew what the law was. Although the trial

court expressed concern over the failed recollection of the State's primary witness regarding the events at the substation, relying on Hillman's testimony, the trial court found Layber's refusal to take the breath test improper.

Standard of Review

This court must accept a trial court's factual findings unless clearly erroneous, and must give "due regard to the trial court's opportunity to judge the credibility of witnesses." *State v. Yang*, 201 Wis.2d 725, 735, 549 N.W.2d 769, 773 (Ct. App. 1996). The trial court's findings here are not clearly erroneous, therefore, with respect to the factual findings we give deference to the trial court.

Probable Cause to Stop and Arrest Layber

In a refusal hearing, one of the issues of the hearing may be "whether the officer had probable cause to believe the person was driving or operating a motor vehicle under the influence of alcohol ... to a degree which renders the person incapable of safely driving." Section 343.305(9) (a)(5)(a), STATS. Layber argues that because there was no reasonable suspicion for the traffic stop, nor probable cause to arrest her, the refusal to submit to the breath test was proper. The State counters with the argument that the issue of probable cause to initially stop her is waived by Layber on appeal because she did not raise it at the trial court level. The record does not support the State's argument. When Layber's attorney argued to the trial court concerning the issues, he included probable cause as an issue. Moreover, the court addressed the issue of probable cause extensively when rendering its decision. "I specifically find and conclude that the officer did have probable cause to make the arrest." Therefore, we conclude the issue of whether there was probable cause to stop and arrest Layber has not been waived on appeal. The State, however, makes an alternative

argument to its waiver claim. The State argues that the record clearly shows that Officer Drzewiecki was justified in stopping Layber's automobile because of Layber's unsafe lane changes.

Investigatory Stop

The validity of an investigatory stop and temporary detention is governed by *Terry v. Ohio*, 392 U.S. 1 (1960), and is codified in § 968.24, STATS. See *State v. King*, 175 Wis.2d 146, 150, 499 N.W.2d 190, 191 (Ct. App. 1993). To execute a valid investigatory stop, "a law enforcement officer must reasonably suspect, in light of his or her experience," that criminal activity has, is or is about to take place. *Richardson*, 156 Wis.2d at 139, 456 N.W.2d at 834. Such reasonable suspicion must "be based on specific and articulable facts which, taken together with various inferences from these facts, and judged against an objective standard," would warrant such an intrusion. *Id.* This test applies to an investigatory stop of a vehicle and the detention of its occupants. *Id.* The Wisconsin Supreme Court has explained:

The focus of an investigatory stop is on reasonableness, and the determination of reasonableness depends on the totality of the circumstances:

It is a common sense question, which strikes the balance between the interests of society in solving crime and the members of that society to be free from unreasonable intrusions. The essential question is whether the action of the law enforcement officer was reasonable under all the facts and circumstances present.

Richardson, 156 Wis.2d at 139-40, 456 N.W.2d at 834 (citations omitted).

In this case, Officer Drzewiecki observed Layber violating the traffic laws by deviating between lanes in an unusual fashion. Layber's swerving of her

car would warrant an officer of reasonable prudence to conclude that a stop was justified. For these reasons, this court affirms the trial court's finding that the stop of Layber was reasonable.

Arrest

Probable cause is a test of “probability and plausibility. It is a common sense test based on ‘considerations of everyday life on which reasonable and prudent persons, not legal technicians act.’” *State v. Putskey*, 1998 WL 751232, 2 (Wis. Ct. App.) (1998).

Probable cause to arrest exists where the officer, at the time of the arrest, has knowledge of facts and circumstances sufficient to warrant a person of reasonable prudence to believe that the person arrested is committing, or had committed, an offense. ... [W]e look to the totality of the circumstances within the officer's knowledge at the place and time of the arrest.

Id. (citations omitted). In the context of this case, the analysis of the totality of the circumstances includes “whether 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.’” *State v. Babbitt*, 188 Wis.2d 349, 356, 525 N.W.2d 102, 104 (Ct. App. 1994) (citation omitted; ellipses in quoted source).

Given the factual determinations made by the trial court and accepted by this court, one must conclude that probable cause existed to stop and arrest Layber. The trial court found, in applying the totality of the circumstances test, that a reasonable officer would have believed Layber was operating her vehicle while intoxicated because she smelled alcohol on Layber's breath, heard Layber slur her speech, and witnessed Layber have difficulty in physically

retrieving her driver's license. Further, the officer observed Layber's "suboptimal" performance on the field sobriety tests. As a consequence, there was ample support for the officer's conclusion that she had probable cause to arrest Layber for driving while under the influence of an intoxicant.

Rebuttal Testimony

Next, Layber argues that the testimony of Officer Hillman was improper rebuttal testimony because Hillman's testimony was "necessary to the state's case-in-chief to meet the burden of proof as to whether or not the accused had been adequately informed." Layber argues that because of the poor recollection of the arresting officer about the sequence of events at the substation concerning the "informing the accused" forms read to Layber, without Hillman's testimony the State would not have met their burden of proof. Thus, Layber contends, Hillman's testimony established for the court that the "informing the accused" form was read to her and should have rightfully been proved in the State's case-in-chief.

The appellate court will not reverse the trial court's decision to admit rebuttal testimony unless there exists a clearly erroneous exercise of discretion. *State v. Watson*, 46 Wis.2d 492, 499, 175 N.W.2d 244, 248 (1970). The standard governing rebuttal testimony is set forth in *Rausch v. Buisse*, 33 Wis.2d 154, 146 N.W.2d 801 (1966). "The general rule is that the plaintiff, in his rebuttal, may only meet the new facts put in by the defendant in his case in reply. This rule is not inflexible and the court may in its discretion allow or refuse to receive such evidence." *Id.* at 167, 146 N.W.2d at 808. "The trial court has considerable discretion in controlling the evidence to be admitted in rebuttal." *Watson*, 46 Wis.2d at 499, 175 N.W.2d at 247. Further, "[w]hether evidence which could

have been admitted as part of the prosecution's case in chief may be received in rebuttal lies within the discretion of the court." *Id.*, 175 N.W.2d at 248.

Layber testified she was not adequately advised of her rights concerning her ability to refuse the tests to assess her alcoholic breath content. Following her testimony, the State called Officer Hillman. When trial counsel objected to the testimony of Officer Hillman as improper rebuttal testimony,² the trial court overruled the objection stating: "[t]here has been largely contradicting testimony about what took place in that room during that 20 minutes period of time. And it's, therefore, proper rebuttal." (referring to the period of time when Layber was read the "informing the accused" form). When rendering its decision, the trial court acknowledged that the testimony of Officer Drzewiecki alone was inadequate to meet the State's burden of proof in the case but that "appropriate rebuttal testimony was taken from Officer Hillman, and I am amply persuaded at the clear and convincing level that Officer Drzewiecki did in fact read paragraph by paragraph the informing the accused form"

The trial court ruled that Hillman's testimony was proper rebuttal testimony. In any event, it was within the court's discretion to allow testimony which could have been admitted in the state's case in chief. We conclude that the trial court did not err in allowing Hillman's testimony in rebuttal.

For the above reasons, the trial court's order finding Layber's refusal to submit to a breath test improper is affirmed.

² Layber claims that trial counsel did not object to the rebuttal testimony. It is clear from our review of the record that trial counsel did object: "[TRIAL COUNSEL]: Excuse me. I'm going just to object. This is not – this is not in the form of rebuttal testimony. This is their case in chief"

By the Court.—Order affirmed.

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

