

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 14, 1999

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. 99-1120

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN THE MATTER OF THE REFUSAL OF KEVIN M. SALM:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KEVIN M. SALM,

DEFENDANT-APPELLANT.

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

¶1 DYKMAN, P.J.¹ Kevin M. Salm appeals from an order revoking his driving privileges for one year for wrongfully refusing to submit to an evidentiary chemical test of his breath pursuant to § 343.305, STATS. Salm

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

contends that there was no probable cause to warrant his arrest for operating a motor vehicle while under the influence of an intoxicant or to administer a preliminary breath test (PBT). Therefore, Salm asserts that he did not wrongfully refuse to submit to evidentiary testing of his breath alcohol concentration. Because there was probable cause to arrest Salm, we affirm the circuit court judgment.

I. BACKGROUND

¶2 At approximately 11:30 p.m. on April 23, 1998, Deputy Scott Johnston of the Marquette County Sheriff's Department heard tires squealing and an engine revving in the Village of Neshkoro. He went to investigate and found fresh tire marks and thrown gravel on the roadway. Deputy Johnston then observed Salm doing "donuts" in the roadway and pulled him over on account of his reckless driving.

¶3 While identifying Salm and his two passengers, Johnston noticed the odor of intoxicants emanating from the inside of Salm's vehicle. Johnston requested that Salm step out of his vehicle. He asked Salm why he was doing donuts, and Salm replied that he was showing off his new truck to his friends. Salm exhibited glassy, bloodshot eyes and slurred speech. Johnston noticed the odor of intoxicants on Salm's breath. Johnston asked Salm if he had been drinking, and Salm admitted that he had. Johnston then conducted various field sobriety tests.

¶4 Johnston first conducted the horizontal gaze nystagmus (HGN) test. He observed a lack of smooth pursuit, onset of nystagmus prior to 45 degrees, and distinct nystagmus at maximum deviation in Salm's eyes. Deputy Johnston then administered the "walk and turn" test. While Johnston demonstrated this

procedure, he instructed Salm to stand heel to toe—a position from which Salm broke away twice. Johnston noted that Salm did not step heel to toe several times and took ten steps, instead of nine as instructed. When he turned, he did not use choppy steps as instructed. Salm also did not step heel to toe several times on the way back from the turn.

¶5 Johnston next administered the “one leg stand” test in which Salm was to count to thirty in “thousands” while raising one leg six inches in the air. Salm informed Deputy Johnston that he had a bad leg. During this procedure, Salm dropped his leg to the ground twice. Deputy Johnston then asked Salm to recite the alphabet—a task that he performed satisfactorily. Finally, Johnston had Salm take a PBT. It registered an alcohol level of .10.

¶6 Johnston advised Salm that he was under arrest for OMVWI and transported him to the Marquette County Sheriff’s Department. He issued Salm a citation for operating a motor vehicle while intoxicated and recited the “informing the accused” form, which included a request for Salm to submit to an evidentiary chemical test of his breath. Salm declined, saying that he had already been tested on the road and would not be tested again. Deputy Johnston informed him that the PBT was not admissible in court and again asked Salm to submit to evidentiary testing. For a second time, Salm refused. Deputy Johnston filled out a notice of intent to revoke operating privileges and an alcohol influence report.

¶7 Salm requested a hearing on the revocation of his operating privileges, pursuant to § 343.305, STATS. In his refusal hearing, Salm was found to have improperly refused to submit to testing of his breath alcohol concentration. On appeal, Salm asserts that Johnston lacked the probable cause needed to arrest him for OMVWI and to administer a PBT. Although, § 343.303, STATS., permits

an officer to request a PBT, it has been interpreted to require that the requesting officer have probable cause to arrest a person for operating a vehicle under the influence of an intoxicant. *See County of Jefferson v. Renz*, 222 Wis.2d 424, 443, 588 N.W.2d 267, 276 (Ct. App. 1998), *review granted*, 222 Wis.2d 673, 589 N.W.2d 628 (1998). Since Johnston did not have probable cause, Salm claims that he did not wrongfully refuse to submit to evidentiary chemical testing of his breath alcohol concentration.

II. ANALYSIS

¶8 Salm maintains that Deputy Johnston lacked the probable cause required for both administering a PBT and arresting him for OMVWI. Whether a set of facts constitutes probable cause is a question of law that we review *de novo*. *See State v. Babbitt*, 188 Wis.2d 349, 356, 525 N.W.2d 102, 104 (Ct. App. 1994). In assessing the existence of probable cause, we consider whether “under the totality of the circumstances and based on all of the facts available to the arresting officer at the time of the arrest, a reasonable officer would believe that the defendant was driving the vehicle while under the influence of an intoxicant.” *State v. Nordness*, 128 Wis.2d 15, 36, 381 N.W.2d 300, 309 (1986). The observations indicating probable cause need not be sufficient to prove guilt beyond a reasonable doubt, nor adequate to prove that guilt is more probable than not. *See State v. Paszek*, 50 Wis.2d 619, 625, 184 N.W.2d 836, 839-40 (1971). It is only necessary that the evidence would “lead a reasonable officer to believe that guilt is more than a possibility.” *Id.* at 625, 184 N.W.2d at 840.

¶9 The facts pertinent in determining whether Deputy Johnston had probable cause to arrest Salm are as follows: Salm was doing donuts in a public roadway; after stopping Salm, Johnston noted a strong odor of intoxicants

emanating from his car; Salm exhibited glassy, bloodshot eyes, and slurred speech; Salm admitted that he had been drinking; during the walk and turn test, Salm missed the heel to toe position on several steps, took the wrong number of steps and turned incorrectly; and during the one leg test, he let his foot drop twice. Salm did, however, satisfactorily recite the alphabet.

¶10 Under the *Nordness* standard, we conclude that the totality of these observations would lead a reasonable officer to believe that Salm was driving his vehicle under the influence of alcohol. These facts are more than adequate to establish probable cause to arrest Salm for OMVWI.

¶11 Salm asserts that the fact that he was doing donuts negates the indication of intoxication because such a maneuver demonstrates that he possessed coordination and control of his vehicle. If this proposition were true, almost any impaired driver could use myriad examples of reckless driving to demonstrate sobriety. Doing donuts in a public roadway indicates impaired judgment, and not coordination or control. Salm's argument is not persuasive.

¶12 Salm did tell Johnston he had a bad leg, but Johnston was not required to accept Salm's statement. Salm further asserts that the trial court failed to make findings as to the relevance of Johnston's observations of Salm's glassy, bloodshot and jerky eyes. Salm intimated that a long day, sitting in front of a computer for seven or eight hours, or a passing motorist may have contributed to the appearance of his eyes. But these are possibilities that Johnston could reject.

¶13 Salm also questioned Deputy Johnston's observations with regard to specifics of the walk and turn test and maintains that he did not fail the "one leg stand" test. Specifically, Salm insists that he exhibited only one clue in that test, thus passing, while Johnston recalls two clues—a failing score. He also claims

that Johnston's account of slurred speech is questionable, as Johnston did not make a note of which words Salm slurred. Moreover, Salm maintains that the court did not afford proper weight to his recitation of the alphabet. But even if the foregoing were true, the totality of Deputy Johnston's observations reaches the level of "that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime." *Johnson v. State*, 75 Wis.2d 344, 348, 249 N.W.2d 593, 596 (1977).

¶14 Salm further maintains that Johnston should have administered tests such as the finger-to-nose test, the finger-count test or the pen-paper-tracing test which "could have provided him with better information." However with reference to Deputy Johnston's observations, conclusions, and choice of procedures, it is important to note that probable cause "is to be 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). There may be a number of sobriety tests that Johnston could have used, but probable cause is based on what he did use and what he observed. In this case, his observations were sufficient.

¶15 Salm cites *Renz*, 222 Wis.2d 424, 588 N.W.2d 267, to support his claim that probable cause to arrest did not exist. The facts of *Renz* are distinguishable from the facts of this case. The stop in *Renz* was predicated on a defective muffler, not the erratic driving in the present case. *See id.* at 428, 588 N.W.2d at 270. Moreover, the officer's observations in *Renz* are not comparable to Deputy Johnston's. Johnston observed several indications of intoxication, such as bloodshot, glassy eyes and slurred speech, that were not present in *Renz*. In short, a reasonable officer could conclude, based on the information known to him or her, that the defendant probably committed the offense. *See State v. Koch*, 175

Wis.2d 684, 701, 499 N.W.2d 152, 161 (1993). In this case, Johnston's observations were sufficient to establish Salm had probably been driving while intoxicated.

¶16 In *State v. Swanson*, 164 Wis.2d 437, 475 N.W.2d 148 (1991), the Wisconsin Supreme Court made it clear that the following indicators are not sufficient to show probable cause: (1) the defendant's erratic driving, (2) the odor of intoxicants coming from the defendant while he spoke, and (3) the incident occurring approximately at the time when bars close in Wisconsin. See *id.* at 453 n.6, 475 N.W.2d at 155 n.6. The facts of this case go well beyond those of *Swanson*. While there may be innocent explanations for Salm doing donuts in a roadway, for his glassy, bloodshot eyes, for his aroma of alcohol, and for his difficulty with balance and walking, it is probable that Salm was driving his vehicle while intoxicated. The threshold for probable cause is low. The evidence need not even reach the level that guilt is more likely than not. See *State v. Mitchell*, 167 Wis.2d 672, 681-82, 482 N.W.2d 364, 367-68 (1992). The trial court did not err in determining that Deputy Johnston had probable cause to arrest Salm and to administer a PBT.

By the Court.—Order affirmed.

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