

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 29, 2005

Cornelia G. Clark
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP192

Cir. Ct. No. 2004TR7233

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN THE MATTER OF THE REFUSAL OF VINCENT W. ENGLISH:

COUNTY OF FOND DU LAC,

PLAINTIFF-RESPONDENT,

v.

VINCENT W. ENGLISH,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Fond du Lac County:

DALE L. ENGLISH, Judge. *Affirmed.*

¶1 BROWN, J.¹ Vincent W. English appeals from an order finding that he improperly refused to submit to a chemical test. He argues that his refusal to perform a field sobriety test was improperly used by the arresting officer as a factor establishing probable cause. The law is well established that refusal to perform a sobriety test can indeed be used as a factor in assessing probable cause because it shows a guilty state of mind. This refusal and other indicia established probable cause to arrest English. Therefore, we affirm.

¶2 The determinative facts in this case are uncontested. Officer John Dille, a patrolman for Fond du Lac County, was on duty in the early morning hours of Sunday, June 6, 2004. While patrolling State Highway 23 at approximately 2:00 a.m., he observed a vehicle traveling eastbound that appeared to be speeding. The officer activated his radar detector and observed that the vehicle was being driven at sixty-six miles per hour in a fifty-five-mile-per-hour zone. The officer stopped the vehicle and approached the driver, English. As the officer spoke with English, he detected a strong odor of intoxicants, glassy, bloodshot eyes, and slurred speech. When Dille asked English if he had been drinking, English said that he had not.

¶3 The officer next asked English to step out of the vehicle to perform some field sobriety tests. English exited the vehicle, and Dille observed him leaning against the vehicle. Two more times Dille requested that English walk back to the squad car, but English refused each time and said that he was not going to perform any field sobriety tests. The officer then placed English under arrest

¹ This case is decided by one judge, pursuant to WIS. STAT. § 752.31(2)(c) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

for violating WIS. STAT. § 346.63(1)(a) (operating under the influence of an intoxicant). Upon his arrest, English also refused to take a chemical test that would have determined his blood alcohol concentration. English was subsequently charged for refusing to submit to the chemical test, contrary to WIS. STAT. § 343.305(9)(a).

¶4 On October 16, the circuit court held a refusal hearing, at which English challenged the probable cause for his arrest. English argued that his refusal to submit to a field sobriety test was not sufficient to establish probable cause. He further claimed that the evidence of slurred speech, smell of intoxicants, and glassy, bloodshot eyes was not enough for the officer to determine probable cause. English also emphasized that the officer did not notice any erratic driving when following him.

¶5 The circuit court rejected English's arguments. The court determined that based on the facts, the inference could be made that English had been drinking on the night of his arrest. The court noted that a strong odor of alcohol, glassy, bloodshot eyes, slurred speech, and speeding at 2:00 in the morning, in combination with leaning against his vehicle and refusing to perform a field sobriety test, was a sufficient amount of evidence to establish probable cause to arrest. Because the arrest was legal, the court found improper English's subsequent refusal to submit to a chemical test and revoked his operating privileges for one year.

¶6 English appeals. He argues that because he refused to submit to field sobriety testing, Dille had no "objective tools" with which to determine whether English had violated the law or was "engaged in purely innocent activity." He also repeats his contention that Dille's other observations of him did

not rise to the level of probable cause. We understand him essentially to claim that because “citizens are entitled to refuse to submit to field sobriety tests,” an arresting officer cannot consider such a refusal—along with his or her other observations—when the officer assesses whether probable cause for an arrest exists. He appears, therefore, to believe that the arrest was illegal, and the court should not have considered his refusal to submit to the chemical test as support for the refusal charge.

¶7 We will suppress evidence only where a statute has been violated and the statute specifies suppression as a remedy or where the defendant’s constitutional rights have been violated. *State v. Repenshek*, 2004 WI App 229, ¶¶23, 277 Wis. 2d 780, 691 N.W.2d 369 (citation omitted). When reviewing the circuit court’s decision, we defer to the court’s findings of fact unless clearly erroneous and review de novo whether such facts satisfy constitutional guarantees. *See State v. Harwood*, 2003 WI App 215, ¶10, 267 Wis. 2d 386, 671 N.W.2d 325 (decision whether to suppress presents a question of constitutional fact).

¶8 We also review de novo whether undisputed facts constitute probable cause. *State v. Babbitt*, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994). We determine probable cause by looking at the totality of the circumstances and asking 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. Nordness*, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986). As long as the officer reasonably believed that the defendant probably committed an offense, probable cause exists. *Babbitt*, 188 Wis. 2d at 357; *State v. Koch*, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993).

¶9 We reject the notion that an arresting officer is not entitled to consider a defendant’s refusal to submit to field sobriety tests when he or she determines probable cause to arrest. We know of no statute that precludes an officer from considering such a refusal, and English cites none. Further, *Repenshek* and *Babbitt* clearly indicate that considering English’s refusal would not violate any constitutional mandates. In *Repenshek*, we assumed that the police officer had no authority to ask the defendant to submit to a preliminary breath test (PBT), such that the defendant was within his rights when he refused to do so. *Repenshek*, 277 Wis. 2d 780, ¶22. We concluded that the officer’s request did not violate the defendant’s constitutional rights, *id.* (“From a constitutional standpoint, there is typically no harm in asking.”), and that the relevant statute did not address whether an officer could rely on the results of a refusal to take the PBT, *id.*, ¶24. Accordingly, we declined to suppress the refusal for purposes of determining reasonable suspicion to support a subsequent blood draw. *Id.*, ¶26.

¶10 Similarly, in *Babbitt*, we allowed refusal evidence of precisely the type at issue here, the refusal to submit to field sobriety tests:

We conclude that just as the refusal to take an Intoxilyzer test is indicative of consciousness of guilt so too is the refusal to perform a field sobriety test. The purpose of the field sobriety test is to make a preliminary determination of whether the defendant is intoxicated. The most plausible reason for a defendant to refuse such a test is the fear that taking the test will expose the defendant’s guilt. Thus, because the defendant’s refusal to submit to a field sobriety test is some evidence of consciousness of guilt, this evidence should be admissible for the purpose of establishing probable cause to arrest.

Babbitt, 188 Wis. 2d at 359-60. *Babbitt* made clear that suspects “have no ... right to refuse to perform a field sobriety test.” *Id.* at 361. Moreover, we reasoned, “a person who performs the field sobriety test should not be placed in a

worse position by virtue of his or her compliance with an officer's request than a defendant who refuses to cooperate with the police." *Id.* at 360. We hold that English's refusal to take a sobriety test indicated consciousness of guilt, and Dille was entitled to consider it in assessing probable cause.

¶11 Turning now to the probable cause determination, we conclude that Dille had probable cause to arrest, based on the totality of the circumstances. Dille made the following observations of English: (1) he was speeding in the middle of a weekend night; (2) he smelled strongly of alcohol; (3) he had glassy, bloodshot eyes; (4) he slurred his speech; (5) he leaned against the side of his vehicle; (6) he denied that he had been drinking; and (7) three times he refused to take a field sobriety test. Based on the evidence, a reasonable police officer could have believed that English "probably committed" the offense of drunk driving. *Babbitt*, 188 Wis. 2d at 357; *Koch*, 175 Wis. 2d at 701.

¶12 We hold that Dille was entitled to use English's refusal to submit to a field sobriety test as probative evidence in determining probable cause to arrest. We also hold that the totality of circumstances in this case permitted the circuit court to find that there was probable cause to arrest English. We affirm.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

