

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**June 29, 2005**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

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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. 2005AP325-CR**

**Cir. Ct. No. 2004CT190**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**ANDREW D. BIRMINGHAM,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Waukesha County:  
KATHRYN W. FOSTER, Judge. *Affirmed.*

¶1 ANDERSON, P.J.<sup>1</sup> Andrew D. Birmingham asserts that the trial court erred when it concluded that the arresting officer had probable cause to

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<sup>1</sup> This is a one-judge appeal pursuant to WIS. STAT. § 752.31(2)(f) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

request him to submit to a preliminary breath test (PBT). We affirm because under the totality of the circumstances a reasonable police officer would believe that Birmingham was operating a motor vehicle while under the influence of an intoxicant.

¶2 Birmingham was convicted after a jury trial of operating a motor vehicle while intoxicated, second offense, in violation of WIS. STAT. §§ 346.63(1)(a) and 346.65(2)(b). On the road to the jury trial, he brought a “Motion to Dismiss Based on Illegal Stop and Arrest” in which he asserted that his arrest lacked probable cause. The trial court denied the motion holding there was “enough evidence of impairment based on this record to support the officer’s request to have Mr. Birmingham submit to a PBT.” The court reasoned the “PBT did exactly what it was supposed to do in cases that ferret out those borderline and leads to arrest or to a nervous episode driver and hopefully much more cautious driving until they get home.” The court concluded that under the totality of the circumstances, the results of the field sobriety tests corroborated the arresting officer’s reasonable suspicions and supported the defendant’s arrest for operating under the influence.

¶3 Birmingham appeals. He contends that the officer skewed the results of four field sobriety tests to support probable cause to require him to submit to a PBT. He argues that he performed the field sobriety tests remarkably well and there was no definitive evidence that he was intoxicated.

¶4 Birmingham argues that the arresting officer did not have probable cause to request that he submit to a PBT. WISCONSIN STAT. § 343.303 provides:

If a law enforcement officer has probable cause to believe that the person is violating or has violated s. 346.63(1) or (2m) ... the officer, prior to an arrest, may request the

person to provide a sample of his or her breath for a preliminary breath screening test using a device approved by the department for this purpose.

¶5 We review probable cause under a de novo standard of review.<sup>2</sup> *County of Jefferson v. Renz*, 231 Wis. 2d 293, 316, 603 N.W.2d 541 (1999). The test of probable cause to request a driver to submit to a PBT is greater than the reasonable suspicion necessary to justify an investigative stop but less than the level of proof required to establish probable cause for arrest. *Id.* at 314. In determining whether probable cause exists, we look to the totality of the circumstances to determine whether the arresting officer’s knowledge at the time of the request would lead a reasonable police officer to believe 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 (Ct. App. 1994) (citation omitted).

¶6 The facts are undisputed and were provided by Waukesha County Sheriff Deputy Kurt Kveen, the arresting officer. In the early morning hours of January 24, 2004, he observed a vehicle westbound on I-94 with a burned out headlight. Kveen stopped the vehicle and identified the driver as Birmingham. His initial observations of the defendant were “glassy bloodshot eyes and I also smelled the odor of intoxicants coming from his breath.” When asked if he had been drinking, the defendant candidly admitted to having six beers earlier in the evening. The deputy testified that when Birmingham spoke, it was with a “slur or thick tongue.”

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<sup>2</sup> Although our review is de novo, we are aided in this case by the trial court’s thoughtful analysis. *Katzman v. State Ethics Bd.*, 228 Wis. 2d 282, 291, 596 N.W.2d 861 (Ct. App. 1999).

¶7 The deputy had the defendant step out of his car for the purpose of performing four field sobriety tests. While it was a cold January night, the deputy testified that there were no weather or road conditions that had a negative impact on the field sobriety tests. Birmingham was asked to recite the alphabet and at the letter W he stopped or hesitated, when he resumed he skipped the letter X and stated Y, Z. The deputy stated that the recitation was with slurred speech and was difficult to understand. Although Birmingham correctly recited the months of the year, he continued to exhibit slurred speech and he was difficult to understand. When performing the one-leg stand, Birmingham counted one 1000 and two 1000; he was swaying on one leg and had some difficulty maintaining his balance. Finally, he correctly performed the finger-to-nose test with his left index finger but with his right index finger, he missed the tip of his nose. Kveen testified that all of the circumstances from the initial stop through the final field sobriety test led him to conclude that the defendant was intoxicated and to request that Birmingham submit to a PBT.

¶8 We point out that Birmingham ignores an important factor present here besides the odor of alcohol coming from him, his glassy eyes, slurred speech and less than perfect performance on the field sobriety test—Birmingham’s candid admission that he had had six beers. Furthermore, there is no specified number or type of indicia of intoxication that must be present in order to establish probable cause. Rather, a probable cause determination is made on a case-by-case basis looking at the totality of the circumstances in each particular case. *See State v. Multaler*, 2002 WI 35, ¶34, 252 Wis. 2d 54, 643 N.W.2d 437. That other cases had more or different indicia of intoxication than this case is therefore irrelevant.

¶9 Not to unduly lengthen this opinion, but our recent comments on the effectiveness of the PBT in *State v. Begicevic*, 2004 WI App 57, ¶10, 270 Wis. 2d 675, 678 N.W.2d 293, applies four-square to the facts in this case:

This case presents the very kind of situation for which the PBT was intended because it aided [Kveen] in determining whether probable cause to arrest existed. The PBT's place in the process of an OWI investigation was discussed by the supreme court in *Renz*, 231 Wis. 2d at 310-11. First, an officer may make an investigative stop pursuant to WIS. STAT. § 968.24 if the officer "reasonably suspects" that a person has committed or is about to commit a crime or reasonably suspects that a person is violating the civil traffic regulations. *Renz*, 231 Wis. 2d at 310. After stopping the vehicle and contacting the driver, the officer's observations may cause the officer to suspect the driver of operating the vehicle while intoxicated. *Id.* If the observations of the driver are not sufficient to establish probable cause for arrest for an OWI violation, the officer may request the driver to perform various field sobriety tests. *Id.* However, the driver's performance on these tests may not produce enough evidence to establish probable cause for arrest.

The legislature has authorized the use of the PBT to assist an officer in such circumstances.... For non-commercial drivers, the officer may request a PBT if there is "probable cause to believe" that the person has been violating the OWI laws. If the driver consents to the PBT, the result can assist the officer in determining whether there is probable cause for the arrest.

*Id.* at 310-11 (citations omitted). If, under the facts, there are reasonable grounds to believe that the person has violated the OWI laws, the officer may arrest the driver under WIS. STAT. §§ 345.22 or 968.07(1)(d). *Renz*, 231 Wis. 2d at 311. [Kveen's] use of the PBT in this case is supported by probable cause and is consistent with its intended purposes.

¶10 We agree with the trial court that under the totality of the circumstances Kveen had sufficient probable cause that would lead to the reasonable request to the defendant to submit to a PBT. And when the .012

percent result of the PBT is added to the total circumstances, Kveen's knowledge at the time he arrested Birmingham would lead a reasonable police officer to believe that the defendant was operating while intoxicated.

*By the Court.*—Judgment affirmed.

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

