

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 20, 2008

David R. Schanker
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. 2007AP2877

Cir. Ct. No. 2007TR1122

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN THE MATTER OF THE REFUSAL OF GILBERT L. RASMUSSEN:

COUNTY OF WASHBURN,

PLAINTIFF-RESPONDENT,

v.

GILBERT L. RASMUSSEN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Washburn County:
EUGENE D. HARRINGTON, Judge. *Affirmed.*

¶1 PETERSON, J.¹ Gilbert Rasmussen appeals an order finding his refusal to submit to a breath test improper and revoking his driving privileges for

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

one year. He argues his refusal was not improper because the arresting officer lacked the reasonable suspicion necessary to detain him for field sobriety tests and, without those tests, there was no probable cause for arrest. We conclude the officer had reasonable suspicion and affirm the order.

BACKGROUND

¶2 On May 27, 2007, Deputy Shawn Sutherland arrested Rasmussen for operating while under the influence. Following the arrest, Sutherland read Rasmussen the informing the accused form and asked him if he would submit to a breath test. Rasmussen refused to take the test. Sutherland issued a notice of intent to revoke Rasmussen's operating privileges. Rasmussen requested a hearing on the revocation.

¶3 At a November 5, 2007 hearing on Rasmussen's motion to vacate the refusal, Deputy Brendan Harrington testified that he responded to an accident call on May 27 at approximately 10:20 p.m. When he arrived at the scene, Rasmussen ran up from a ditch and stated that his friend had crashed on a motorcycle. Rasmussen took Harrington to the location about fifty feet from the road, where he found Steven Palechek drifting in and out of consciousness. Harrington smelled an odor of intoxicants coming from Rasmussen and asked him if he had been drinking. Rasmussen replied that he and Palechek were drinking at Snag's Bar in Spooner before the crash. Sutherland arrived on the scene and Harrington told him he smelled an odor of intoxicants coming from Rasmussen and Rasmussen admitted drinking. Harrington left the crash scene to follow Palechek to the hospital.

¶4 Sutherland testified that Rasmussen said he was drinking at his daughter's graduation party, which started around 4:30 p.m. After the party, he

went on a “poker run” in Spooner, stopping at bars during the poker run. The last stop was Snag’s Bar, where he consumed alcohol. Sutherland stated that Rasmussen was swaying back and forth as they spoke. After administering field sobriety tests, Sutherland arrested Rasmussen.

¶5 At the hearing, Rasmussen testified he had been driving his motorcycle behind Palechek on their way home from Snag’s Bar when a sedan forced Palechek off the road. Rasmussen admitted he had two beers at Snag’s Bar before the accident and stated that he had met Palechek on the poker run. However, he stated that he did not go on the poker run with Palechek, had only gone to one bar before Snag’s, and had only two drinks the whole night. On cross, he stated he drank a “seven-seven,” not beer.

¶6 The court found there was enough evidence to support probable cause for the arrest, Sutherland had complied with WIS. STAT. § 343.305(4) by properly reading the informing the accused form, and Rasmussen improperly refused the test. The court denied Rasmussen’s motion to vacate the refusal.

DISCUSSION

¶7 On appeal, Rasmussen argues Sutherland did not have reasonable suspicion to detain him for field sobriety tests. He contends that without the field sobriety tests, Sutherland did not have probable cause to arrest him and, therefore, his refusal was proper.²

² Rasmussen’s refusal hearing was limited to the issues found in WIS. STAT. § 343.305(9)(a). See *State v. Nordness*, 128 Wis. 2d 15, 25-26, 381 N.W.2d 300 (1986). Those issues are whether: the officer had probable cause to believe Rasmussen operated the motor vehicle while under the influence of alcohol, the officer complied with the informed consent statute, the person refused the test not due to a physical inability. See WIS. STAT.

(continued)

¶8 This court applies a two-step standard of review to constitutional search and seizure inquiries. *State v. Matejka*, 2001 WI 5, ¶16, 241 Wis. 2d 52, 621 N.W.2d 891. The trial court’s findings of evidentiary or historical fact will be upheld unless they are clearly erroneous. *Id.* However, this court independently evaluates those facts against the constitutional standard to determine whether the seizure was lawful. *Id.*

¶9 An officer may detain a person for field sobriety tests, if the officer has a reasonable suspicion that the person committed an offense. *See State v. Rutzinski*, 2001 WI 22, ¶14, 241 Wis. 2d 729, 623 N.W.2d 516. Reasonable suspicion depends on whether an officer’s suspicion is grounded in “specific, articulable facts and reasonable inferences from those facts” indicating the individual committed an offense. *State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996) (citation omitted). An officer does not need to observe unlawful conduct, rather, the officer must consider the totality of the circumstances and draw reasonable inferences about the cumulative effect. *Id.* at 58.

¶10 Here, Sutherland knew from Harrington that Harrington smelled the odor of intoxicants on Rasmussen and that Rasmussen admitted drinking. In addition, Rasmussen admitted to Sutherland that he consumed alcohol and had been to more than one bar. Further, Sutherland observed Rasmussen swaying back and forth as they spoke. These facts taken together gave rise to a reasonable suspicion for Sutherland to believe Rasmussen had been operating while under the influence.

§ 343.305(9)(a)-(c). Here, Rasmussen concedes that he refused to take the test, he was physically able to take the test, and the officer complied with the informed consent statute.

By the Court.—Order affirmed.

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

