

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 28, 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. 2007AP2644

Cir. Ct. No. 2007CT544

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN THE MATTER OF THE REFUSAL OF BRITTANY L. ROE:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

BRITTANY L. ROE,

DEFENDANT-APPELLANT.

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

DALE L. ENGLISH, Judge. *Affirmed.*

¶1 BROWN, C.J.¹ Brittany L. Roe appeals the trial court’s order finding that she improperly refused to take a breathalyzer test in violation of this state’s implied consent law. She alleges that there was no probable cause to arrest her and that testimony by the officer that he read Roe the implied consent form is insufficient to show that she was advised of her rights under WIS. STAT. § 343.305(4). This court holds that there was probable cause to arrest and that the testimony about the officer having read her the implied consent form was sufficient. We affirm.

¶2 This story begins with a report of an underage drinking party allegedly occurring at a certain address on July 6, 2007. At about 11:30 p.m., an officer was dispatched to check out the allegation. The record does not say what became of that investigation. At about 4:00 the next morning, the officer was again dispatched to the address in question. This was a result of multiple reports that there was a physical altercation occurring between a female and a male. When the officer arrived, he observed that a male was physically restraining Roe, having pinned Roe to the floor, and told the officer that he needed assistance. The officer saw that there was damage to the door suggestive of a forced entry. The officer also observed that Roe was in a heightened emotional state, hyperventilating, with a strong odor of intoxicating beverage on her breath, and that her face was flushed. He described her as “completely out of control.” The male told the officer that he had done nothing wrong and accused Roe of having broken into the premises. To sort things out and secure the scene, the officer then handcuffed Roe and placed her in his squad.

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

¶3 While in the back of the squad, Roe said she had asthma and needed her inhaler. She said it was in the bedroom, but it was not in the bedroom. The officer asked her, “[I]s that your car down there?” The officer thought that the inhaler might possibly be in the vehicle. Roe said it was her vehicle. The officer checked the registration of the vehicle and it came back registered to Brittany Roe. The officer located Roe’s purse in the vehicle.

¶4 At some point, the officer asked Roe how she had gotten to the residence. Roe answered that her mother drove her there and had driven her in the parked vehicle. Roe was placed under arrest for disorderly conduct and criminal damage to property and was transported to the police station.

¶5 En route to the police station, the officer attempted to verify Roe’s statement that she had not driven to the location. The officer called Roe’s mother who told the officer that she had indeed driven Roe to the location, but earlier, on the evening of July 6. When the officer was at the location around 11:45 earlier in the evening, he had not seen Roe’s vehicle. At the station, the officer conducted field sobriety tests, determined that there was probable cause to arrest her for operating a motor vehicle while intoxicated and read her the informing the accused form. The officer then asked Roe if she would take a breathalyzer test and she refused.

¶6 Roe’s first claim is that there was no probable cause to arrest her for disorderly conduct or criminal damage to property and, by way of a “fruit of the

poisonous tree” argument, no authority to investigate her for having operated a vehicle while intoxicated.²

¶7 We conclude that ample probable cause existed for Roe’s arrest. The arrest was not made solely on the statements of Roe’s accuser. Rather, the officer saw for himself that there was damage to the door. The officer surmised, obviously based on his experience as a police officer, that the damage was consistent with a forced entry. The officer knew that Roe did not live on the premises and knew that Roe had either driven to the premises or had been driven there. The officer knew that Roe was out of control and yelling and screaming. Certainly, based on the officer’s own personal observations alone, there was probable cause to arrest Roe for disorderly conduct (her yelling and being out of control) and criminal damage to property (it was not her house, the accuser stated that she had broken in and the officer saw for himself that the door had been damaged in a way consistent with a break-in).

¶8 The above recited evidence shows that the totality of the circumstances within the officer’s knowledge could lead a reasonable police officer to believe that Roe probably committed crimes. *See State v. Kutz*, 2003 WI App 205, ¶11, 267 Wis. 2d 531, 671 N.W.2d 660. Such belief was based on the officer’s experience and training. *State v. Pozo*, 198 Wis. 2d 705, 711-12, 544 N.W.2d 228 (Ct. App. 1995).

² Roe does not challenge the existence of probable cause to believe that she was operating a motor vehicle while intoxicated, *see* WIS. STAT. § 343.305(9)(a)5.a., only probable cause to arrest for disorderly conduct and property damage.

¶9 Roe maintains that it was not her who broke in and that there was no proof that she was the person who damaged the door. She notes that she herself was one of the people who had called the police and summoned them to the scene. She also maintains that her behavior was due to the fact that she was being pinned down while having an asthma attack and that explained her anxiety. She asserts that given these innocent explanations for her conduct, there was only a “possibility,” rather than a probability, that she had committed a crime.

¶10 This argument fails to square with established Fourth Amendment law. Probable cause may exist notwithstanding a possible innocent explanation for the defendant’s conduct. *See State v. Higginbotham*, 162 Wis. 2d 978, 995, 471 N.W.2d 24 (1991); 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.2(e), at 78 (4th ed. 2004). Here, the fact that Roe might *possibly* not have broken into the house, or that her conduct might *possibly* be explained away, does not require the officer to ignore all of the facts and reasonable inferences indicating that she had committed a crime.

¶11 Roe’s other issue, sufficiency of the evidence that she received all the information about the implied consent law to which she was entitled, is a nonstarter. The officer’s duty is to inform the driver of the statutory warnings so that the driver can make an informed decision regarding whether to submit to evidentiary testing. *See Washburn County v. Smith*, 2008 WI 23, ¶52, ___ Wis. 2d ___, 746 N.W.2d 243. This is accomplished by reading the informing the accused form. This is what the officer did here. Roe maintains that the record is silent as to what information was provided to her. That is not so. The record shows that the officer testified to having read the informing the accused form. The trial court impliedly (and reasonably) found that, by this, the officer was describing a standard form having all of the statutorily-required information. We

uphold a trial court's factual findings unless they are clearly erroneous, and this one is not. Roe asserts that she is entitled to be informed of her "rights" under WIS. STAT. § 343.305(4). This is exactly the information that is contained in the form. Again, the officer testified that he read the form. We are at a loss to understand what more the State had to show to satisfy the statute.

By the Court.—Order affirmed.

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

