COURT OF APPEALS
DECISION
DATED AND FILED

June 26, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2736-CR **Cir. Ct. No. 2005CT513**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID A. FELDMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County: GUY D. REYNOLDS, Judge. *Affirmed*.

¶1 LUNDSTEN, J.[1] David Feldman appeals the circuit court's judgment convicting him of operating a vehicle with a prohibited alcohol

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

concentration (third offense), operating while revoked (second offense), and misdemeanor bail jumping. Feldman challenges the circuit court's order denying his motion to suppress the results of a preliminary breath test (PBT) and a blood draw. We affirm the judgment.

Background

¶2 The relevant facts are from the suppression hearing. The arresting officer was the sole witness. The officer testified that he was in the parking lot at the police station on the day in question at approximately 9:18 a.m. when he heard a vehicle with a loud exhaust. The vehicle came to a stop or parked at the top of a hill. The officer pulled his squad car in behind the vehicle to make a traffic stop for the loud exhaust.

¶3 The driver and a passenger exited the vehicle. The officer made contact with the driver and asked for a driver's license. The driver did not provide the officer with a license but instead verbally identified himself as David Feldman. The officer asked Feldman to wait in his vehicle while the officer returned to his squad to run Feldman's information. Dispatch advised the officer that Feldman's license was revoked due to an OWI-related offense.

¶4 While the officer was running Feldman's information, Feldman approached the officer's squad. The officer asked Feldman to wait at his own vehicle. Feldman returned to his vehicle, but, as the officer was filling out citations, Feldman again approached the officer's vehicle and admitted that he did not have a valid driver's license. The officer again asked Feldman to wait in his vehicle. Feldman instead went to the passenger side of his vehicle and crawled underneath it to either adjust his exhaust or remove the muffler and tailpipe.

¶5 After completing the citations, the officer placed Feldman under arrest for operating after revocation. The officer noticed that Feldman's eyes were "slightly" or "noticeably" red, though not glassy, and that Feldman appeared nervous. As the officer was placing Feldman into the rear of his squad, the officer noticed an odor of intoxicants. The officer asked Feldman if he had been consuming alcohol, and Feldman responded that he had two or three beers late the previous night. Feldman then began claiming that he was not the one driving the vehicle and that he had a witness to prove it, even though the officer had observed who was operating the vehicle and that Feldman "exited behind the driver's side."

¶6 The officer administered a PBT. Feldman blew weakly into the PBT device, which registered a result of 0.062%. The officer searched Feldman's truck and found a six-pack of beer in a bag on the floor of the passenger side of the truck and empty beer cans in the rear box of the truck. The officer then transported Feldman to a hospital for a blood draw. It showed that Feldman's blood alcohol content was 0.219%.

¶7 The circuit court concluded that the officer had probable cause to request the PBT and probable cause to arrest Feldman for operating a vehicle while under the influence of an intoxicant. Feldman appeals.

Discussion

¶8 When reviewing an order granting or denying a motion to suppress evidence, we will uphold the circuit court's findings of fact unless they are clearly erroneous. ***State v. Mata***, 230 Wis. 2d 567, 570, 602 N.W.2d 158 (Ct. App. 1999). The question of whether those facts constitute probable cause, however, is a question for our independent review. ***Id.***

¶9 Feldman raises two issues: (1) whether the officer had "probable cause to believe" Feldman was violating a drunk driving law within the meaning of WIS. STAT. § 343.303, thus justifying the officer's request for a PBT, and (2) whether the officer had probable cause to arrest Feldman for operating a motor vehicle while intoxicated, thus justifying the blood draw under WIS. STAT. § 343.305(3).[2]

¶10 WISCONSIN STAT. § 343.303 authorizes an officer to administer a PBT when the officer has "probable cause to believe" that the person is violating or has violated a drunk driving law. In this context, "'probable cause to believe' refers to a quantum of proof greater than the reasonable suspicion necessary to justify an investigative stop, … but less than the level of proof required to

[2] WISCONSIN STAT. § 343.303 provides, in relevant part:

> **Preliminary breath screening test.** If a law enforcement officer has probable cause to believe that the person is violating or has violated s. 346.63(1) or (2m) or a local ordinance in conformity therewith, or s. 346.63(2) or (6) or 940.25 or s. 940.09 where the offense involved the use of a vehicle, … 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. The result of this preliminary breath screening test may be used by the law enforcement officer for the purpose of deciding whether or not the person shall be arrested ... and whether or not to require or request chemical tests as authorized under s. 343.305(3).

WISCONSIN STAT. § 343.305(3) provides, in relevant part:

> (a) Upon arrest of a person for violation of s. 346.63(1), (2m) or (5) or a local ordinance in conformity therewith, or for a violation of s. 346.63(2) or (6) or 940.25, … a law enforcement officer may request the person to provide one or more samples of his or her breath, blood or urine for the purpose specified under sub. (2).

establish probable cause for arrest." ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 316, 603 N.W.2d 541 (1999); *see also* ***State v. Colstad***, 2003 WI App 25, ¶23, 260 Wis. 2d 406, 659 N.W.2d 394.

¶11 Thus, the standard for "probable cause to believe" under WIS. STAT. § 343.303 is marginally lower than the standard for probable cause to arrest. Probable cause to arrest is commonly defined as the quantum of proof that would lead a reasonable police officer to believe that a person "probably committed" a crime. ***Renz***, 231 Wis. 2d at 302.

¶12 In either instance, the test is a nontechnical, common-sense one.

> As the very name implies, it is a test based on probabilities …. It is also a commonsense test. The probabilities with which it deals are not technical: "[T]hey are the factual and practical considerations of everyday life on which reasonable and prudent men [and women], not legal technicians, act."

County of Dane v. Sharpee, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990) (citations omitted). In determining whether probable cause exists, we examine the totality of the circumstances known to the officer. *See* ***id.***

Probable Cause To Request PBT

¶13 Feldman argues that the PBT results should have been suppressed because the officer lacked the probable cause necessary to request a PBT. Feldman's main argument is that Feldman's red eyes and the officer's eventual detection of the odor of alcohol on Feldman's breath were insufficient, without more, to provide the officer with the necessary probable cause.

¶14 Feldman's argument ignores the totality of the circumstances. As the facts recited in the background section above demonstrate, Feldman's red eyes

and the odor of alcohol on Feldman's breath were not the only pertinent facts the officer had before him by the time the officer administered the PBT.

¶15 Based on the officer's testimony, the circuit court found that the officer could reasonably believe that Feldman was lying when he claimed he was not the driver of the vehicle. The circuit court further found that Feldman was "less than truthful" about his driver's license status. Moreover, Feldman appeared nervous and failed to follow the officer's directions to stay in his vehicle.

¶16 From these facts, as the circuit court reasoned, the officer could reasonably conclude that Feldman "had something to hide, perhaps much to hide." As the court also aptly reasoned, the officer could have reasonably concluded from Feldman's lack of candor that Feldman was lying about how much alcohol he had consumed and about when he had consumed it.

¶17 In addition, the officer knew by the time he requested the PBT that Feldman had at least one previous OWI-related offense. Although the circuit court did not rely on this fact in its decision, we consider it. Feldman does not argue that an officer's knowledge of prior OWI-related offenses cannot be considered in the totality-of-the-circumstances analysis. *See* ***State v. Kutz***, 2003 WI App 205, ¶17 n.4, 267 Wis. 2d 531, 671 N.W.2d 660 ("Nothing in [***State v.*** ***Betow***[, 226 Wis. 2d 90, 593 N.W.2d 499 (Ct. App. 1999),] suggests that a prior arrest may not be considered as part of the totality of circumstances a reasonable officer takes into account ….").

¶18 We recognize that there were some facts here that might have suggested Feldman was *not* driving while intoxicated. In particular, the officer testified that he did not notice any stumbling or "bad walking" behaviors, that Feldman was not slurring any words, and that Feldman's eyes were not glassy. On

balance, however, we agree with the State and the circuit court that the totality of the circumstances gave the officer probable cause to request a PBT. The absence of a few of the many possible signs of intoxication was not enough in this case to dispel the officer's reasonable belief that Feldman was intoxicated.

¶19 Feldman seems to be arguing that we cannot consider the officer's testimony that Feldman appeared nervous because that testimony was conclusory. Feldman cites no case law, however, requiring an officer to describe precisely what it is about a suspect's behavior that led the officer to conclude that the suspect appeared nervous.

¶20 Feldman also seems to be arguing that the circuit court erroneously found that he was evasive about his driver's license status. We are not persuaded. The circuit court acknowledged that Feldman did not affirmatively lie about his license status but found that Feldman was "less than truthful" when the officer initially questioned him. This finding is not clearly erroneous in light of the officer's testimony that Feldman responded to the request for his license by initially providing his name but no license and then later admitting that he did not have a valid license.

¶21 In sum, we conclude that the officer had probable cause to request a PBT.

Probable Cause To Arrest

¶22 Feldman argues that the blood draw results should have been suppressed because the officer lacked probable cause to arrest him for operating a motor vehicle while intoxicated and, therefore, the officer was not authorized to test Feldman's blood under WIS. STAT. § 343.305(3). The parties agree that

Feldman was under arrest for operating a motor vehicle while intoxicated once the officer obtained the PBT results.[3] The dispute is whether that arrest was justified by probable cause. The facts relevant to whether the officer had probable cause to arrest Feldman for operating a motor vehicle while intoxicated are the facts we have already discussed, along with the circumstances surrounding the PBT.

¶23 As already indicated, Feldman blew weakly into the PBT, registering a result of 0.062%, which is below the legal limit. The circuit court found:

> [T]here is nothing in this record to indicate that a weak blow into a PBT suggests that the reading is—would be higher if there was a stronger blow using the comparative terms that were used in the testimony. That's maybe the case, but there is no testimony here that—that would establish that with any certainty.

The court nonetheless agreed with the State that the totality of the circumstances provided probable cause to arrest for operating a motor vehicle while intoxicated.

¶24 We conclude that the PBT, although yielding a result under the legal limit, adds to the probable cause inquiry in light of the particular facts here. *Cf.* ***Sharpee***, 154 Wis. 2d at 516-20 (PBT result of 0.01% did not negate probable cause to arrest when there was no dispute that, absent the PBT, such probable cause existed).

[3] Feldman states in his brief-in-chief that the parties stipulated in the circuit court that the officer placed Feldman under arrest for operating a motor vehicle while intoxicated when the officer "put Feldman in the squad." This description appears imprecise. The officer's testimony suggests that he placed Feldman in his squad *before* requesting the PBT. Yet, the parties discuss the PBT results in addressing whether there was probable cause for that arrest. Accordingly, the parties necessarily agree that Feldman was not under arrest for operating a motor vehicle while intoxicated until *after* the officer administered the PBT.

¶25 First, the officer could have reasonably concluded from Feldman's weak blow into the PBT that Feldman was attempting to avoid an accurate result that would show he was driving while intoxicated. Feldman suggests no legitimate reason—such as physical inability—for blowing weakly into the PBT.

¶26 Second, we disagree with the circuit court that "there is nothing in this record to indicate" that a stronger blow may have produced a higher PBT result. We understand this observation by the circuit court to be a legal conclusion that the officer's testimony would not support a finding or a reasonable inference that Feldman's weak blow skewed the PBT result downward. *See* ***Madcap I, LLC v. McNamee***, 2005 WI App 173, ¶7, 284 Wis. 2d 774, 702 N.W.2d 16 ("Whether an inference is reasonable and whether particular evidence permits more than one reasonable inference are both questions of law, which we review de novo."). The record *does*, however, support such a finding or inference and would *not* support a contrary one. The officer testified that he was trained to administer PBTs and that he was the "PBT technician" for his department. According to the officer, if an individual does not blow hard enough into the PBT, there is a "weak" sample, and the test only picks up "whatever alcohol goes through the tube." The officer testified that Feldman's weak blow "did not cause the PBT to whistle" and that Feldman produced a "weak sample." Feldman did not undercut this testimony by producing a witness of his own.

¶27 Accordingly, we agree with the circuit court's ultimate conclusion that there was probable cause to arrest Feldman for operating a motor vehicle while intoxicated once the PBT was completed. Under the circumstances, we agree with the circuit court that the PBT further corroborated the officer's reasonable belief that Feldman was driving while intoxicated.

By the Court.—Judgment affirmed.

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