

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 7, 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. 2008AP122-CR

Cir. Ct. No. 2007CM105

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL C. BIELMEIER,

DEFENDANT-APPELLANT.

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

¶1 BRIDGE, J.¹ Daniel C. Bielmeier appeals a judgment convicting him of operating a motor vehicle with a prohibited alcohol concentration, second offense. He challenges the trial court's denial of his motion to suppress the results

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 unless otherwise noted.

of a preliminary breath test (PBT). He contends that the arresting officer did not have the requisite probable cause under WIS. STAT. § 343.303 to administer the test, and, hence, did not have probable cause for the arrest. We disagree and affirm the judgment.

BACKGROUND

¶2 The relevant facts are from the suppression hearing. The arresting officer was the sole witness. The officer testified that at approximately 2:30 a.m. on the day in question, he observed a vehicle traveling eastbound on Main Street in the City of Wautoma at a speed he estimated to be forty miles per hour in a twenty-five miles per hour zone. After confirming the vehicle's speed to be forty miles per hour through the use of radar, the officer activated his emergency lights and pursued the vehicle. The vehicle did not pull over immediately, but instead continued for approximately fifteen to twenty seconds, making a right turn from Main Street to Division Street and then another right turn from Division Street into a parking lot where the traffic stop ultimately took place.

¶3 The officer exited his squad car and approached the vehicle. Bielmeier rolled his window down and the officer noticed the odor of intoxicants coming from inside the vehicle. Bielmeier told the officer that he was coming from Grimm's, a local bar. The officer was familiar with the bar and knew that it closed at 2:30 a.m. Bielmeier said that he had been drinking there and had consumed four beers. When asked how long he had been drinking, Bielmeier said that he was playing cards with friends before going to the bar and had started drinking when the card playing ended. The officer asked Bielmeier to submit to field sobriety tests, and Bielmeier consented.

¶4 The first test administered was a one-leg-stand test. The officer instructed Bielmeier to count in a series of thousands. As Bielmeier performed this test, he quickly counted to thirty and then put his foot down. The officer observed one ‘clue,’ or sign of intoxication. The second test administered was a walk-and-turn test. The officer instructed Bielmeier to take nine heel-to-toe steps, turn using short, choppy steps, and return in nine heel-to-toe steps, all while keeping his arms at his sides. As Bielmeier performed the test, the officer observed three clues. Bielmeier turned improperly, in a spinning rather than choppy motion; he misstepped twice on his return; and he brought his arms out from his body, likely to maintain balance. The last field sobriety test the officer administered was a fingertip-to-nose test, which Bielmeier passed.

¶5 The officer then asked Bielmeier to submit to a PBT. The PBT registered a result of .16, above the legal limit of .08. Bielmeier was placed under arrest and subsequently charged with operating a motor vehicle with a prohibited alcohol concentration and operating a motor vehicle while under the influence of an intoxicant, both second offense charges.

¶6 Bielmeier moved to suppress the evidence from the PBT, arguing that the arresting officer did not have probable cause to administer the test. The circuit court denied the motion and Bielmeier was subsequently convicted of operating a motor vehicle with a prohibited alcohol concentration, second offense. Bielmeier appeals his conviction, challenging the denial of his motion to suppress.

STANDARD OF REVIEW

¶7 When reviewing a motion to suppress, 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.*

DISCUSSION

¶8 The issue before us is whether the officer had probable cause to administer a PBT under WIS. STAT. § 346.303. Although he does not argue this explicitly, Bielmeier apparently contends that without the PBT results, no probable cause for arrest exists. WISCONSIN STAT. § 343.303 provides, in relevant part: “If a law enforcement officer has probable cause to believe that the person is violating or has violated s. 346.63(1)² ... 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”

¶9 In *County of Jefferson v. Renz*, 231 Wis. 2d 293, 317, 603 N.W.2d 541 (1999), the supreme court outlined the quantum of proof necessary for an

² WISCONSIN STAT. § 346.63(1) provides in relevant part:

Operating under influence of intoxicant or other drug.

(1) No person may drive or operate a motor vehicle while:

(a) Under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, a controlled substance and a controlled substance analog, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving; or

(am) The person has a detectable amount of a restricted controlled substance in his or her blood.

(b) The person has a prohibited alcohol concentration.

officer to require a PBT as being “a quantum of proof that 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.” The court stated further that “[a]n officer may request a PBT to help determine whether there is probable cause to arrest a driver suspected of [driving while intoxicated], and the PBT result will be admissible to show probable cause for an arrest, if the arrest is challenged.” *Id.* at 316.

¶10 The defendant in *Renz* exhibited the following indicators of intoxication: (1) his vehicle smelled of intoxicants; (2) he admitted to drinking three beers; (3) he exhibited one clue on the one-leg-stand test; (4) he exhibited two clues and one indicator on the heel-to-toe walking test; and (5) he exhibited one indicator on the finger-to-nose test. *Id.* at 296-98.³ While the court noted that the defendant’s speech was not slurred and he was able to substantially complete all administered field sobriety tests, it nevertheless found the required degree of probable cause for the officer to request a PBT. *Id.* at 316-17.

¶11 Bielmeier exhibited the following indicators of intoxication: (1) his vehicle smelled of intoxicants; (2) he admitted to drinking four beers without any time-specific reference; (3) he exhibited one indicator on the one-leg-stand test; and (4) he exhibited three clues on the walk-and-turn test. In addition, the fact that Bielmeier’s speeding occurred around “bar time” can lend credence to a suspicion

³ The horizontal gaze nystagmus (HGN) was also administered to Renz, and he exhibited all six clues on this test. However, the supreme court concluded that the officer had sufficient probable cause to request the PBT even without the HGN. *County of Jefferson v. Renz*, 231 Wis. 2d 293, 317 n.15, 603 N.W.2d 541 (1999).

that he was intoxicated. *See State v. Post*, 2007 WI 60, ¶36, 301 Wis. 2d 1, 733 N.W.2d 634. Here, the stop occurred shortly after bar closing time.

¶12 Bielmeier contends that the officer in the present case had less information regarding his intoxication than did the officer in *Renz*. However, the *Renz* court did not declare that the facts in that case represented the minimum level of proof necessary to constitute probable cause under the PBT statute. We are satisfied that the information available to the officer made it appropriate to turn to the PBT to assist in the decision of whether Bielmeier should be arrested.

¶13 For the foregoing reasons, we conclude, based on the record, that the officer had the requisite probable cause to administer a PBT. We conclude further that, under the totality of the circumstances, *see County of Dane v. Sharpee*, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990), the PBT result, coupled with the other valid indicators of Bielmeier's intoxication, gave the officer probable cause to arrest Bielmeier. Accordingly, we affirm the denial of Bielmeier's suppression motion and the judgment of conviction.

By the Court.—Judgment affirmed.

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

