COURT OF APPEALS
DECISION
DATED AND FILED

July 17, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 00-3410-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RYAN C. RUMLOW,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dunn County: WILLIAM C. STEWART, Judge. *Affirmed.*

¶1 HOOVER, P.J.[1] Ryan Rumlow appeals a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant, contrary

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c). All references to the Wisconsin Statutes are to the 1999-2000 version.

to WIS. STAT. § 346.63(1)(a).[2] He claims that the arresting officer did not have probable cause to administer a preliminary breath test. Rumlow thus contends that the trial court erred by denying his motion to suppress evidence. This court concludes that the officer had a sufficient legal basis to administer a preliminary breath test and therefore the judgment is affirmed.

BACKGROUND

¶2 The following facts were established at the hearing on Rumlow's suppression motion. At approximately 2:50 a.m. on February 19, 2000, Wisconsin State Patrol trooper Jason Spetz was on routine patrol in the city of Menomonie. He was traveling southbound on Broadway, a four-lane road, when he observed Rumlow's vehicle exit a parking lot and turn south on Broadway. Upon exiting the parking lot, Rumlow made an illegal turn, going into the far lane and then swerving back into the closest lane. As Spetz continued to follow Rumlow's vehicle, he observed several rapid accelerations and improper stops. For example, on one occasion Rumlow stopped in an intersection well beyond the stop line and

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[2] WISCONSIN STAT. § 346.63(1)(a) provides in part:

> 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 ….

The judgment of conviction indicates that Rumlow was also convicted of operating a motor vehicle with a prohibited blood alcohol content, contrary to § 346.63(1)(b). *See* ***State v. Bohacheff***, 114 Wis. 2d 402, 413, 338 N.W.2d 466 (1983) (legislature intended prosecution for driving while under influence of an intoxicant and for having blood alcohol concentration of .10% or more while operating vehicle to terminate as one conviction for all purposes).

on another he did not stop at all. Spetz was unable to measure Rumlow's speed, but estimated that he was traveling between five and ten miles per hour over the posted twenty-five-mile-per-hour speed limit.

¶3 Spetz was trained and experienced in detecting and apprehending drivers impaired by alcohol. Based upon his observations, he stopped Rumlow. During Spetz's initial contact with Rumlow, he smelled intoxicants coming from inside Rumlow's vehicle. Rumlow admitted to having had approximately five beers that evening. Rumlow performed field sobriety tests at Spetz's request. He lost his balance and was unable to maintain the proper starting position during the instruction phase of the walk and turn test, although he did complete the test. Similarly, Rumlow completed the one-leg stand test, although he swayed as he stood in front of Spetz. In fact, Rumlow swayed throughout the field testing. He was unable to recite the alphabet in two attempts.

¶4 Spetz also testified that Rumlow did not weave in his own lane, used his turn signal properly, responded appropriately to Spetz's emergency lights, did not fumble for his driver's license, did not have slurred speech and was cooperative.

¶5 Based on his observations of Rumlow's driving, his personal contact, field sobriety test results and his training and experience, Spetz concluded that Rumlow was under the influence of an intoxicant. After the field tests and before arresting Rumlow for operating while under the influence of an intoxicant, Spetz administered a preliminary breath test (PBT). The test result was .18%.

¶6 The trial court viewed a video taken from Spetz's squad car that the trial court indicated did not "maybe to the lay person indicate a lot of impairment." It also stated that the tape revealed traffic violations, but did not depict some

indicia of intoxication, such as the odor of intoxicants or Rumlow's admission that he had consumed approximately five beers.

¶7 Rumlow argued to the trial court that Spetz did not have sufficient probable cause to administer the PBT and did not have probable cause for the arrest.[3] The court denied Rumlow's motion, finding that he committed a number of traffic violations, emitted an odor of intoxicants, and admitted consuming five beers. The trial court also took into account the officer's description of Rumlow's performance of the field tests and the manner in which Rumlow drove his vehicle.

STANDARD OF REVIEW

¶8 This court will uphold the trial court's findings of fact unless they are clearly erroneous. ***State v. Richardson***, 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990). Whether those facts satisfy the statutory standard of probable cause is a question of law that this court reviews de novo. ***Id.*** at 137-38.

DISCUSSION

¶9 On appeal Rumlow again argues that Spetz did not have the level of probable cause necessary to support a request to perform a PBT.[4] He contends that Spetz merely "had a hunch that Mr. Rumlow was operating his vehicle while intoxicated." This court disagrees.

[3] Because Rumlow argued before the trial court that the PBT result should be suppressed, presumably it is his view that without the result there would not be probable cause for the arrest.

[4] In his brief Rumlow first provides a general discussion of the standard of reasonable suspicion to execute a valid investigatory stop, but he does not pursue the argument.

¶10 The first sentence of WIS. STAT. § 343.303 states that "[i]f a law enforcement officer has probable cause to believe that the person is violating or has violated s. 346.63(1)," the officer, prior to an arrest, may request the person to provide a PBT. In ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 603 N.W.2d 541 (1999), our supreme court held that the level of probable cause required before an officer may request a PBT under WIS. STAT. § 343.303 is a lesser amount of proof than probable cause for arrest. The court held:

> First, an officer may make an investigative stop if the officer "reasonably suspects" that a person has committed or is about to commit a crime, Wis. Stat. 968.24, or reasonably suspects that a person is violating the non-criminal traffic laws. After stopping the car and contacting the driver, the officer's observations of the driver may cause the officer to suspect the driver of operating the vehicle while intoxicated. If his 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. 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.

Renz, 231 Wis. 2d at 310 (footnote and citation omitted). The court thus held that "probable cause to believe" in WIS. STAT. § 343.303 refers to a quantum of proof greater than "any presence" of an intoxicant, ***id.***, or even than the reasonable suspicion necessary to justify an investigative stop, but, as indicated, less than probable cause for arrest. ***Id.*** at 316.

¶11 In ***Renz***, the officer had training and experience in detecting WIS. STAT. § 346.63(1)(a) violations. ***Id.*** at 297. Renz exhibited several indicators of intoxication. ***Id.*** at 316. His car smelled of intoxicants, and he admitted to drinking three beers before driving. ***Id.*** During the one-leg stand test, he was not

able to hold his foot up for the required thirty seconds, and he restarted his count at ten, stopping at eighteen. ***Id.*** He appeared unsteady during the heel-to-toe test, and was not able to properly perform the finger-to-nose test. ***Id.*** at 316-17. Renz's speech, however, was not slurred, and he was able to substantially complete all of the tests. ***Id.*** at 317.

¶12 The ***Renz*** court concluded that the officer had the required degree of probable cause to request Renz to submit to a PBT. ***Id.*** It observed that because there were both exculpatory and inculpatory circumstances, "[t]he officer was faced with exactly the sort of situation in which a PBT proves extremely useful in determining whether there is probable cause for an OWI arrest." ***Id.***

¶13 As seen, Rumlow correctly argues that ***Renz*** requires more than a suspicion of intoxication before the police can require a suspect to submit to a PBT. He further contends that the evidence did not rise above the level of mere suspicion. To support his argument, Rumlow focuses upon evidence consistent with his sobriety, minimizing and depreciating the inculpatory evidence. He also faults Spetz for not searching for innocent explanations for conduct that contributed to the probable cause determination.[5]

[5] Rumlow also argues that the trial court's findings are against the great weight and clear preponderance of the evidence because they were derived from the officer's recollection instead of the videotape evidence. Rumlow provides no authority for the proposition that the trial court could not consider the tape in the context of the officer's testimony. This court will not consider arguments unsupported by legal authority. *See* ***State v. Shaffer***, 96 Wis. 2d 531, 545-46 n.3, 292 N.W.2d 370 (Ct. App. 1980). Moreover, the trial court did not state that the tape disclosed no impairment. Finally, the court considered evidence the tape did not reveal, such as the odor of intoxicants and Rumlow's admission that he had consumed alcohol. There is no basis in the record to support the proposition that the trial court's reliance upon Spetz's recollection in these regards was clearly erroneous.

¶14 Rumlow's first strategy, of recasting the evidence, is futile. A probable cause determination does not include weighing the State's and the defendant's evidence. *See* ***State v. Nordness***, 128 Wis. 2d 15, 36, 381 N.W.2d 300 (1986). As to Rumlow's second approach, law enforcement officers are not required to rule out the possibility of innocent behavior before initiating a brief stop. ***State v. Waldner***, 206 Wis. 2d 51, 60, 556 N.W.2d 681 (1996). Similarly, Spetz was not required to rule out innocent explanations for apparent indications of intoxication.

¶15 This court concludes that there was sufficient probable cause to sustain the PBT administration. There was evidence of suspect and illegal driving. There was also evidence of alcohol induced impairment in the form of odor, an admission of consumption, and physical unsteadiness. On the other hand, there was evidence that Rumlow might not be impaired to the point that there was probable cause for an arrest. As in ***Renz***, Spetz confronted circumstances in which a PBT would prove extremely useful in determining whether there is probable cause to arrest for operating a motor vehicle while under the influence of an intoxicant. ***Id.*** at 317.

¶16 The trial court properly concluded that there was probable cause to require Rumlow to submit to a PBT. This probable cause, combined with the PBT result, was sufficient to sustain the trial court's further determination that there was probable cause to arrest Rumlow for operating a motor vehicle while under the influence of an intoxicant.

By the Court.—Judgment affirmed.

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