

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 16, 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. 2008AP124

Cir. Ct. No. 2007TR7627

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN THE MATTER OF THE REFUSAL OF HEIDI J. MOE:

COUNTY OF JEFFERSON,

PLAINTIFF-APPELLANT,

v.

HEIDI J. MOE,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Jefferson County:
JACQUELINE R. ERWIN, Judge. *Affirmed.*

¶1 BRIDGE, J.¹ Jefferson County appeals an order dismissing the County's action against Heidi J. Moe for refusing to submit to a chemical test

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.

under Wisconsin's implied consent law, WIS. STAT. § 343.305(2). The County challenges the court's ruling that Moe's refusal was proper because the arresting officer lacked probable cause to believe Moe was operating a motor vehicle under the influence of an intoxicant. The County argues that contrary to the court's ruling, the evidence did establish probable cause. We disagree and affirm the dismissal.

BACKGROUND

¶2 At approximately 1:45 a.m. on October 6, 2007, Jefferson County Deputy Sheriff Daniel Horvatin stopped Moe's vehicle for driving 68 miles per hour in a 55 mile per hour zone. Before stopping the vehicle, Horvatin did not observe Moe engage in any erratic driving, leave her lane of traffic, or cross over the center line. Horvatin testified that when he approached Moe's vehicle, he observed that Moe's eyes were bloodshot and noticed the smell of alcohol. He further testified that Moe stated she was coming from a bar where she was "doing karaoke or DJing a karaoke party." Moe initially stated that she had consumed one or two alcoholic beverages during the course of the evening, but later admitted to having three.

¶3 Horvatin asked Moe multiple times to exit her vehicle to perform field sobriety tests. However, Moe did not do so. During the course of the exchange between Horvatin and Moe, Moe made a call to someone using her cellular telephone, apparently to determine whether she was obligated to perform the field sobriety tests. Horvatin testified that Moe eventually stated something to the effect that, "If I'm not under arrest, let me leave; otherwise place me under arrest." Horvatin then informed Moe that she was under arrest and Moe stepped out of her vehicle. Horvatin testified that he read Moe the informing the accused

form and asked her to submit to an evidentiary chemical test, which she declined to do.

¶4 Moe was cited for OWI in violation of WIS. STAT. § 346.63(1)(a).² She was also issued a notice of intent to revoke her operating privileges on the ground that she had refused one or more chemical tests under WIS. STAT. § 343.305(9) after being placed under arrest.

¶5 A hearing was held on Moe's refusal to consent to chemical testing. Horvatin was the sole witness at the hearing. In addition, the court reviewed the recording of the traffic stop. The court found that in light of Moe's "clear speech, lucid conversation, unimpaired balance and generally good driving," the factors relied upon by the County as establishing probable cause to believe Moe was operating her motor vehicle under the influence of an intoxicant, including "time of day, excess speed, admission of alcohol use, order of intoxicants and bloodshot eyes," were insufficient. The court therefore ruled that the County had not met its burden to show that Moe's refusal to consent to the chemical test or tests was unlawful and dismissed the action. The County appeals.

DISCUSSION

¶6 All persons operating a motor vehicle on the public highways are "deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol ... when requested to do so by a law enforcement officer under sub. (3)(a)" WIS. STAT. § 343.305(2). Upon arrest for OWI, an officer

² Moe's operating while intoxicated charge is not at issue in this appeal.

may request that the person arrested provide one or more samples of blood, breath or urine for testing. Section 343.305(3)(a). If, after being read a form containing the information required by § 343.305(4), the person refuses to submit to such testing, the officer is to provide the person with notice of intent to revoke operating privileges. Section 343.305(9)(a). The person may contest the revocation by requesting a hearing. Section 343.305(8)(b).

¶7 The County’s burden at the refusal hearing was to “present evidence sufficient to establish an officer’s probable cause to believe the person was driving or operating a motor vehicle while under the influence of an intoxicant.” *State v. Nordness*, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986). Probable cause exists where the totality of the circumstances within the officer’s knowledge at the time would lead a reasonable police officer to believe the person was operating a motor vehicle while under the influence of an intoxicant. *Id.* Whether probable cause existed based on the facts is a question of law which we review independently of the circuit court. *State v. Kasian*, 207 Wis. 2d 611, 621, 558 N.W.2d 687 (1996).

¶8 In determining whether Horvatin had probable cause to believe Moe was operating her motor vehicle under the influence of alcohol, the County first argues that Moe’s refusal to participate in field sobriety tests should be given “greater weight” than it otherwise would under different circumstances. It is true that the refusal to submit to a request to perform field sobriety tests “is indicative of [a] consciousness of guilt” and may be used as evidence to support a finding of probable cause. *State v. Babbitt*, 188 Wis. 2d 349, 359-60, 525 N.W.2d 102 (Ct. App. 1994). However, the County does not cite to any authority supporting its apparent assertion that the refusal to submit to field sobriety tests is more indicative of intoxication than any other indicia, and should thus be given greater weight. We do not consider arguments unsupported by citation to authority. *See*

State v. Pettit, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). Accordingly, we reject this contention.

¶9 The County next argues that regardless of the weight to be given to Moe's refusal to submit to field sobriety tests, under the totality of the circumstances a reasonable police officer would have concluded that Moe was probably intoxicated. The County points out that in addition to refusing the field sobriety tests, Moe admitted to having consumed alcohol, Horvatin observed the odor of alcohol, he observed that her eyes were bloodshot, and she was stopped for a traffic violation after leaving a bar at a time of traditionally heightened OWI activity. Moe asserts that her bloodshot eyes were explained by her five hours of working at the bar, and that she had admitted to drinking alcohol. She also argues that speeding is not necessarily an indicator of impairment. In addition, she points out that she was not observed driving erratically prior to being pulled over, her speech was clear, and she was not unsteady on her feet.

¶10 We conclude that under the totality of the circumstances in this case, the facts did not establish probable cause to believe Moe was operating a motor vehicle under the influence of an intoxicant. We therefore affirm the circuit court's dismissal of the action.

By the Court.—Order affirmed.

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

