

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 18, 2009

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. 2008AP2497-CR

Cir. Ct. No. 2007CT148

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GENE E. BLUM,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Green County: JAMES R. BEER, Judge. *Reversed.*

¶1 HIGGINBOTHAM, P.J.¹ Gene E. Blum appeals an order denying his motion to suppress evidence and the judgment convicting him of operating a

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(d) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

motor vehicle while under the influence of an intoxicant (OWI), third offense, contrary to WIS. STAT. § 346.63(1)(a). Blum entered a plea of no contest after the court denied his motion to suppress evidence obtained following a preliminary breath test (PBT). Blum argues that the investigating officer lacked the requisite probable cause under WIS. STAT. § 343.303 to administer the PBT. We agree and therefore reverse the judgment of conviction and the order denying Blum's motion to suppress.

BACKGROUND

¶2 The following facts are stipulated and are taken from the officers' reports. During an afternoon in September 2007, Gene Blum was moving his belongings out of an apartment he shared with Norma Johnson. Johnson called the Green County Sheriff's Department during the move and said that Blum would not leave and that she wanted him out. Deputy Charles Worm responded to the call. On his way to the apartment, Deputy Worm, who had had prior professional contacts with Blum, spotted Blum driving his truck. Deputy Worm requested that a Brodhead Police Officer stop Blum and wait with him until Deputy Worm completed his investigation at Johnson's apartment. At the apartment, Johnson told Deputy Worm that Blum had consumed alcohol earlier that day.

¶3 Responding to Deputy Worm's request, Officer Nicholas Bartels of the Brodhead Police Department made a traffic stop of Blum's truck. Officer Bartels informed Blum of the reason for the stop and waited for Deputy Worm. Thereafter, Deputy Worm arrived and questioned Blum. Deputy Worm reported to Officer Bartels that Blum had admitted to drinking earlier that day, and that Deputy Worm knew Blum to be a heavy drinker through previous professional contacts with him. Based on this information, Officer Bartels asked Blum to

perform a PBT. Blum registered a .28 on the PBT. Officer Bartels then had Blum perform field sobriety tests. Blum did not pass the tests, and Officer Bartels arrested him for operating a motor vehicle while under the influence of an intoxicant. Additional facts are provided in the discussion section.

¶4 In the circuit court, Blum made two motions to suppress evidence, the first alleging that Officer Bartels lacked reasonable suspicion to stop him,² the second alleging that Officer Bartels lacked probable cause to request the PBT. The parties stipulated to the facts in Deputy Worm's and Officer Bartels' investigative reports for the purpose of deciding the suppression motions. The court denied both motions. Blum pled no contest to third offense OWI and judgment was entered against him. Blum appeals.

DISCUSSION

¶5 The sole issue is whether Officer Bartels had the requisite probable cause under WIS. STAT. § 343.303³ to request that Blum submit to a PBT. This is a question of law, which we review de novo. *County of Jefferson v. Renz*, 231 Wis. 2d 293, 316, 603 N.W.2d 541 (1999). In our review, we must consider

² In the circuit court, Blum had also sought to suppress evidence based on the allegation that Officer Bartels lacked reasonable suspicion to conduct a traffic stop. Blum has abandoned this argument on appeal.

³ 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) 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.

common sense interpretations of the totality of the circumstances known to the officer at the time. *See County of Dane v. Sharpee*, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990).

¶6 To request a PBT, a police officer must “have probable cause to believe” a person has operated or is operating a motor vehicle while intoxicated. WIS. STAT. § 343.303. The result of a PBT may be used by the officer for the purpose of deciding whether to arrest the person for OWI. *Id. Renz* is the principle case interpreting and applying § 343.303. In *Renz*, the supreme court set the probable cause standard under the statute at “a quantum of proof 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.” *Renz*, 231 Wis. 2d at 316.

¶7 Blum argues that the facts known by Officer Bartels failed to meet the requisite standard for probable cause under WIS. STAT. § 343.303. The State argues that, taken together, the following facts known to Officer Bartels at the time he requested the PBT were sufficient to establish probable cause for purposes of § 343.303: (1) Blum’s admission that he had consumed alcohol that day; (2) the facts that Blum had been involved in a domestic altercation, and that excessive drinking is often associated with such altercations; and (3) Deputy Worm’s prior professional contacts with Blum, which had convinced Deputy Worm that Blum was a heavy drinker.

¶8 We conclude that these facts do not give rise to probable cause under WIS. STAT. § 343.303 to administer the PBT to Blum. Although there is no dispute that Blum had consumed alcohol earlier in the day, there is no information in Deputy Worm’s or Officer Bartels’ report indicating the type of alcohol or the

amount of alcohol Blum had consumed, and over what period of time. Likewise, assuming for argument sake that there is some correlation between domestic altercations and excessive drinking, there is no evidence that that assumption should be applied to Blum. Similarly, Deputy Worm's knowledge that Blum was a heavy drinker based on prior professional contacts may support a suspicion that Blum was intoxicated at the time he was requested to take the PBT. However, without other facts providing a firmer basis to believe Blum was under the influence of an intoxicant, knowledge of Blum's drinking habits did not support his request that Blum submit to the PBT. In short, when considered together, these facts fail to meet the requisite standard under § 343.303 to administer the PBT to Blum.

¶19 Significantly, neither officer reported observing any indicia of intoxication before the PBT was requested. The complete lack of indicia of intoxication distinguishes the present case from *Renz*. Like Blum, Renz was stopped for a reason unrelated to an OWI violation and admitted to consuming alcohol earlier that day. *Renz*, 231 Wis. 2d at 296. However, the investigating officer in *Renz* detected a strong odor of intoxicants coming from Renz's vehicle during his initial conversation with the defendant. *Id.* The officer asked Renz to submit to field sobriety tests, and Renz agreed. *Id.* at 296-97. In multiple tests, Renz exhibited several clues of intoxication. *Id.* at 297. During the hand-to-nose test, Renz touched the bridge of his nose instead of the tip; he stepped off the line during the heel-to-toes walking test, and left a half an inch to an inch between his heel and his toes; he could not keep his foot raised from the ground for the full thirty seconds during the one-legged stand test; and he showed all six clues of intoxication associated with the horizontal gaze nystagmus test. *Id.* at 297-98.

The *Renz* court concluded that these multiple indicia of intoxication gave the investigating officer probable cause to request the PBT. *Id.* at 316-17.

¶10 While the facts in *Renz* do not represent the minimum level of proof necessary to constitute probable cause under the PBT statute, here, the officers did not observe *any* signs of intoxication during their initial contacts with Blum. In addition, they did not attempt to obtain evidence of intoxication by asking Blum to submit to field sobriety tests *before* administering the PBT.⁴ In other words, Blum exhibited no indication of being intoxicated at the time he was administered the PBT. *Renz* requires more than just a suspicion of intoxication before administering a PBT.

CONCLUSION

¶11 In sum, we conclude that no probable cause existed under WIS. STAT. § 343.303 to support Officer Bartels request that Blum submit to a PBT. We therefore reverse the judgment of conviction and order denying Blum's motion to suppress.

By the Court.—Judgment and order reversed.

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

⁴ We observe that the field sobriety tests results may have provided probable cause to arrest Blum. However, we note that the circuit court did not make this finding and that the State does not argue that we should affirm the circuit court because probable cause to arrest existed absent the PBT results. We therefore do not consider this argument.

