

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**July 23, 2002**

Cornelia G. Clark  
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. 01-2093-CR  
STATE OF WISCONSIN**

Cir. Ct. No. 99-CF-91

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JASON D. GALEWSKI,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Trempealeau County: ROBERT W. WING, Judge. *Affirmed.*

Before Cane, C.J, Hoover, P.J. and Peterson, J.

¶1 PER CURIAM. Jason D. Galewski appeals from an order denying his motion to suppress and a judgment convicting him of injury by intoxicated use

of a motor vehicle, contrary to WIS. STAT. § 940.25(1)(a).<sup>1</sup> Galewski argues that the trial court erred by denying his suppression motion because the arresting officer lacked probable cause to administer a preliminary breath test (PBT) and therefore, lacked probable cause to arrest him. We conclude that the officer had probable cause to administer the PBT and, therefore, affirm the conviction and the order denying Galewski's suppression motion.

### **BACKGROUND**

¶2 At approximately 2:30 a.m. on November 4, 1998, Trempealeau County deputy sheriff Roxanne McDonah arrived at the scene of a two-car accident. McDonah testified at the suppression hearing that she initially questioned Galewski about the events leading to the collision. Because she smelled "a little bit" of an intoxicant on Galewski's breath, McDonah asked Galewski if he had been drinking. Galewski told McDonah that he had imbibed three, four or five beers, although McDonah could not recall the exact number. McDonah then briefly questioned the driver of the other car, who told McDonah that the collision occurred when Galewski's car swerved into her lane.

¶3 Because Galewski was visibly shivering and shaking, McDonah instructed him to sit in her squad car to keep warm. After assisting with traffic control, McDonah returned to her squad car to get her camera. McDonah testified that when she requested Galewski to get her camera out of the glove compartment, he fumbled with the latch. McDonah made a note of Galewski's inability to open

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<sup>1</sup> All references to the Wisconsin Statutes are to the 1999-2000 version.

the glove compartment, but acknowledged that it could have been because he was shaken up and unfamiliar with the location of the latch.

¶4 McDonah ultimately sat in the driver's seat of her squad car to talk to Galewski. McDonah testified that when she got into the car and closed the door, she noticed an overwhelming smell of intoxicants. McDonah also noticed that Galewski's eyes appeared glassy and bloodshot. Because she apparently had worked with Galewski in the past, McDonah recognized that Galewski's speech was slurred. Based on her observations, McDonah decided to give Galewski a PBT. After the PBT resulted in a reading of .13%, McDonah arrested Galewski.

¶5 Galewski's motion to suppress evidence was denied. Galewski was convicted upon his guilty plea and this appeal followed.

#### ANALYSIS

¶6 Galewski argues that the trial court erred by denying his suppression motion because McDonah lacked probable cause to administer the PBT and therefore, lacked probable cause to arrest him. We disagree. 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) ... 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. ... 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 for a violation of s. 346.63(1). ... The result of the preliminary breath screening test shall not be admissible in any action or proceeding except to show probable cause for an arrest.

¶7 In *County of Jefferson v. Renz*, 231 Wis. 2d 293, 304, 603 N.W.2d 541 (1999), our supreme court explained that the purpose of WIS. STAT. § 343.303

is “to allow officers to use the PBT as a tool to determine whether to arrest a suspect and to establish that probable cause for an arrest existed, if the arrest is challenged.” The court stated that the statute “maximizes highway safety, because it makes the PBT an effective tool for law enforcement officers investigating possible OWI violations.” *Id.* at 315. The court fixed the level of probable cause 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.” *Id.* at 316.

¶8 The question in this case is whether the facts McDonah observed satisfied this level of probable cause. Whether undisputed facts constitute probable cause is a question of law that we review without deference to the circuit court. *State v. Babbitt*, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994). However, despite our de novo standard of review, we value the circuit court’s opinion. *See Scheunemann v. West Bend*, 179 Wis. 2d 469, 475, 507 N.W.2d 163 (Ct. App. 1993).

¶9 While probable cause is a varying standard depending on the different burdens of proof that apply at a particular stage of the proceeding, *see Renz*, 231 Wis. 2d at 308, the core concept of probable cause remains constant. Probable cause “is a test based on probabilities; and, as a result, the facts ... ‘need only be sufficient to lead a reasonable officer to believe that guilt is more than a possibility.’” *Dane County v. Sharpee*, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990) (citation omitted). As a result, the probabilities addressed by probable cause are not technical. *Id.* Instead, they rest on the practical considerations of everyday life upon which reasonable and prudent persons, not legal technicians, act. *Id.* The bottom line is that probable cause represents a common sense test. *Id.*

¶10 In *Renz*, the driver did not smell of intoxicants (although his car did) and he did not have slurred speech. He was able to complete all of the field sobriety tests, although he exhibited some clues of intoxication. The supreme court concluded, “The 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,” and allowed the test results. *Id.* at 317.

¶11 Galewski reasons that the facts here are weaker than those in *Renz*, and therefore the probable cause requirement of WIS. STAT. § 343.303 has not been met. Specifically, Galewski argues that McDonah did not have probable cause to administer the PBT because she had not asked Galewski to perform field sobriety tests.<sup>2</sup> We are not persuaded.

¶12 The *Renz* court did not declare that the facts there represented the minimum level of proof necessary to constitute probable cause under the PBT statute. Nor has any other court fashioned such a hard and fast probable cause standard. In fact, this court has rejected an analysis that rigidly determines probable cause based upon similar or near similar facts in prior cases. For instance, in *State v. Mata*, 230 Wis. 2d 567, 570-72, 602 N.W.2d 158 (Ct. App. 1999), the State and the defense cited to competing cases, each with factual scenarios supportive of their competing positions on the probable cause question. We saw no need to engage in such factual comparisons because “the question of

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<sup>2</sup> At the suppression motion hearing, McDonah testified that she did not administer field sobriety tests because there was “no safe place for [Galewski] to get out of the vehicle and walk around.” Although McDonah conceded that she could have conducted field tests in the squad car, she explained that she had not been trained to perform those specific tests.

probable cause turns on the facts of the particular case” and “the totality of the circumstances.” *Id.* at 572.

¶13 Here, McDonah was informed that the collision occurred when Galewski’s vehicle swerved into the oncoming lane of traffic. McDonah smelled alcohol on Galewski’s breath, and Galewski confirmed that he had been drinking beer. McDonah noted that Galewski’s eyes were glassy and bloodshot and that his speech was slurred. Under these circumstances, we agree with the circuit court that these facts were sufficient to support probable cause to administer the PBT. We therefore affirm the conviction and the order denying Galewski’s suppression motion.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

