

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 26, 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. 01-2933-FT
STATE OF WISCONSIN**

**Cir. Ct. Nos. 01-TR-2540
01-TR-2541**

**IN COURT OF APPEALS
DISTRICT III**

BARRON COUNTY,

PLAINTIFF-RESPONDENT,

V.

VICKI L. BUCHNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Barron County: JAMES C. EATON, Judge. *Affirmed.*

¶1 CANE, C.J.¹ Vicki Buchner appeals from an order denying her motion to suppress and a judgment convicting her of operating a motor vehicle while under the influence of an intoxicant, contrary to WIS. STAT. § 346.63(1)(a),

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). This is also an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

and operating a motor vehicle with a prohibited alcohol concentration, contrary to § 346.63(1)(b). Buchner claims the arresting officer lacked probable cause to administer a preliminary breath test (PBT), and hence lacked probable cause to arrest her. As a result, she argues that the trial court erred by denying her suppression motion. We conclude that the officer had probable cause to administer the PBT and, therefore, affirm the conviction and the order denying Buchner's suppression motion.

Background

¶2 Deputy Larry Tripp from the Barron County Sheriff's Department responded to a call from dispatch regarding a motor vehicle accident on a rural county road. When Tripp arrived at the accident scene, he observed a severely damaged full-size sport utility vehicle rolled over in the ditch. He also observed two women with injuries, one of whom was Buchner, leaning against the SUV. The other woman was in the passenger seat. When asked about the accident, Buchner stated that she was driving down the dirt road following a vehicle that was kicking up dust, thereby limiting her ability to see the road. Buchner said that when another vehicle passed her going in the opposite direction, it made it even harder for her to see the road. She stated that she then attempted to slow down, but lost control of her vehicle and went into the ditch, causing it to roll over.

¶3 Tripp noted that he had no control problems when braking to stop on the dirt road. While talking to Buchner, he also noted an odor of intoxicants coming from her breath. He was unable to determine if her balance was affected by alcohol because she continued to lean against her vehicle and had a leg injury.

¶4 Buchner and her passenger were transported by ambulance to the local hospital where Tripp again spoke to Buchner. He again observed an odor of intoxicants coming from her breath. He asked her whether she had any alcohol to drink and she replied that she had three beers. Because Buchner was unable to perform any field sobriety tests due to her injuries, Tripp requested that she submit to a PBT. Tripp testified that the PBT registered a result that exceeded the legal limit, but he did not note the specific level. He recalled that the test result showed Buchner's blood alcohol content was about .15%. After this test, Tripp placed Buchner under arrest.

¶5 Buchner filed a suppression motion contending that Tripp did not have probable cause to administer the PBT. The court denied her motion. After a stipulated trial, the court found her guilty of operating a motor vehicle while under the influence of an intoxicant and operating a motor vehicle with a prohibited alcohol content. The sole issue on appeal is whether the officer had probable cause to administer the PBT.

¶6 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), the 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 Tripp 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 trial 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 opinion of the trial court. *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 commonsense 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 Buchner 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. However, 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, 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. *Id.* at 570-72. We saw no need to engage in such factual comparisons because "the question of probable cause turns on the facts of the particular case" and "the totality of the circumstances." *Id.* at 572.

¶12 Here, Tripp was faced with the scene of Buchner having lost control of her vehicle, causing it to go into a ditch where it rolled over. Her vehicle was severely damaged. However, Tripp noted that he had no control problems on the road when braking. He also observed that Buchner had an odor of intoxicants coming from her breath both at the accident scene and later at the hospital. Buchner also admitted that she had consumed three beers before the accident. It remained possible that Buchner might not have been intoxicated. Thus, Tripp

turned to the PBT to assist in the decision of whether Buchner should be arrested. As the supreme court has observed, the PBT procedures of WIS. STAT. § 343.303 were designed to address this very kind of situation. *See Renz*, 231 Wis. 2d at 317. Under these circumstances, we agree with the circuit court that these facts were sufficient to support probable cause to administer the PBT.

¶13 We therefore affirm the judgment of conviction and order denying Buchner's suppression motion.

By the Court.—Judgment and order affirmed.

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