

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**October 29, 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. 02-0094  
STATE OF WISCONSIN**

**Cir. Ct. No. 01 TR 8932**

**IN COURT OF APPEALS  
DISTRICT I**

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**IN RE THE MATTER OF THE  
REFUSAL OF GLEN A. LEWIS:**

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**GLEN A. LEWIS,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Milwaukee County:  
RAYMOND E. GIERINGER, Reserve Judge. *Affirmed.*

¶1 WEDEMEYER, P.J.<sup>1</sup> Glen A. Lewis appeals from an order of revocation of his driver's license. Lewis claims that there was not probable cause

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (1999-2000).

for his arrest and that his refusal to submit to a field sobriety test was reasonable. Because there was probable cause for arrest and because the refusal was therefore unreasonable under WIS. STAT. § 343.305(2) (1999-2000),<sup>2</sup> this court affirms.

## I. BACKGROUND

¶2 On February 18, 2002, City of Greenfield Police Officer Les Piotrowski was monitoring traffic in the early morning hours in the 3500 block of Highway 100. Officer Piotrowski observed Lewis come to a complete stop in the roadway and get struck by another vehicle.

¶3 Officer Piotrowski observed Lewis exit his vehicle, and walk right past Officer Piotrowski who was calling for him to stop. Eventually Lewis stopped, and while Piotrowski was attempting to interview Lewis, he noticed an odor of intoxicants and that Lewis was unsteady on his feet. During the interview of Lewis, Officer Piotrowski felt threatened, and Lewis was very uncooperative. As a result of Lewis's demeanor, Officer Piotrowski requested back up.

¶4 Sergeant Paul Schlecht, a seventeen-year veteran of the police department, arrived at the scene and observed Lewis in a heated argument with Officer Piotrowski. Schlecht intervened and subsequently requested identification from Lewis. Lewis initially refused, and denied that he was driving. When Lewis attempted to locate his driver's license from his wallet, he gave Schlecht a grocery checkout time card and then a credit card.

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<sup>2</sup> All references are to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶5 Additionally, Sergeant Schlecht noticed that Lewis had a heavy odor of intoxicants, poor balance, and that the zipper of his pants was completely unzipped. At one point, Lewis admitted to Schlecht that he was driving, but when Schlecht asked him to perform field sobriety tests, he refused, again denying that he was driving.

¶6 Lewis then attempted to light a cigarette but was told not to. Schlecht said he was worried about Lewis having a lit object while he was exhibiting such aggressive behavior. Lewis was arrested for hindering, and was taken to the Greenfield Police Station where he was asked to perform field tests, but again refused.

¶7 Finally, Sergeant Schlecht informed Lewis that he was under arrest for operating a motor vehicle while intoxicated. He read Lewis the Informing the Accused form, and asked Lewis to submit to a blood test. Lewis refused, once more denying that he was driving.

¶8 Blood was taken from Lewis and he was then charged with operating a motor vehicle with a prohibited blood alcohol content in addition to an operating while intoxicated second offense.

¶9 Subsequently, Lewis brought a motion before the trial court for determination of probable cause because Lewis argued there was no probable cause for arrest. The motion was heard on October 18, 2001, and the court found that there was probable cause to support Lewis's arrest. Lewis also requested a refusal hearing because he contended that his refusal to take a field sobriety test was reasonable. A hearing was held on November 29, 2001, and the trial court found that the refusal was not reasonable and therefore, ordered that Lewis's

license be revoked for twelve months, imposed and stayed pending the time to file an appeal. Lewis now appeals.

## II. DISCUSSION

¶10 Lewis contends that there was no probable cause for his arrest. He argues that he was arrested for lighting a cigarette and that a reasonable person would not see this as a basis for arrest. He also argues that he was not arrested for an offense that involved driving or operating a motor vehicle.

¶11 If there are questions of fact that are evidentiary or historical they will not be overturned unless they are clearly erroneous. *State v. Esser*, 166 Wis. 2d 897, 903, 480 N.W.2d 541 (Ct. App. 1992). However, in this case the question is one of constitutional fact and therefore they require the application of constitutional principles to the facts as found and the court will independently determine these facts. *State v. Hartwig*, 123 Wis. 2d 278, 283, 366 N.W.2d 866 (1985).

¶12 Probable cause for arrest for the purposes of the issue at hand is defined by WIS. STAT. § 343.305(9)(a)5.a. as “[w]hether the officer had probable cause to believe the person was driving or operating a motor vehicle while under the influence of alcohol ....” *Id.* Probable cause to arrest exists where the officer, at the time of arrest, has knowledge of the facts and circumstances sufficient to warrant a person of reasonable prudence to believe that the arrestee is committing, or has committed, an offense. *County of Dane v. Sharpee*, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990) (citations omitted). The information need only lead a reasonable officer to believe that guilt is more than a possibility. *Id.* This is a commonsense test dealing with non-technical probabilities. *Id.* Courts are to look to the totality of the circumstances faced by the officer at the time of the

arrest to determine whether he or she reasonably believed that the defendant had committed an offense. *Id.*

¶13 Lewis argues that lighting a cigarette is not something that a reasonable person would see as a basis for arrest. However, the basis for arrest was not solely the lighting of the cigarette. The first basis for arrest was for hindering, but later, when Lewis was taken to the police station, he was told that he was being arrested for operating a motor vehicle while intoxicated. He was read the Informing the Accused form before being asked to submit to a blood test. Based on the foregoing, this court therefore addresses whether there was probable cause for the arrest at the police station.

¶14 Factors that have been considered in finding probable cause to arrest the defendant for drunk driving include: the smell of alcohol on the defendant's breath;<sup>3</sup> the defendant's refusal to submit to a field sobriety test;<sup>4</sup> the defendant's irrational denial of an obvious fact;<sup>5</sup> and the defendant's uncooperative attitude, belligerence, refusal or reluctance to comply with the officer's requests or commands.<sup>6</sup>

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<sup>3</sup> See *State v. Nordness*, 128 Wis. 2d 15, 36-37, 381 N.W.2d 300 (1986); *State v. Kasian*, 207 Wis. 2d 611, 622, 558 N.W.2d 687 (Ct. App. 1996) (a strong odor of intoxicants about the defendant); *State v. Babbit*, 188 Wis. 2d 349, 355-57, 525 N.W.2d 102 (Ct. App. 1994); *State v. Willie*, 185 Wis. 2d 673, 677-78, 518 N.W.2d 325 (Ct. App. 1994); *State v. Dunn*, 158 Wis. 2d 138, 144, 146, 462 N.W.2d 538 (Ct. App. 1990); *County of Dane v. Sharpee*, 154 Wis. 2d 515, 517, 453 N.W.2d 508 (Ct. App. 1990); *State v. Wolske*, 143 Wis. 2d 175, 189-90, 420 N.W.2d 60 (Ct. App. 1988); *State v. Bentley*, 92 Wis. 2d 860, 864, 286 N.W.2d 153 (Ct. App. 1979).

<sup>4</sup> See *State v. Mallick*, 210 Wis. 2d 428, 434, 565 N.W.2d 245 (Ct. App. 1997); *Babbit*, 188 Wis. 2d at 355-57; *Wolske*, 143 Wis. 2d at 189-90.

<sup>5</sup> See *Dunn*, 158 Wis. 2d at 144-46.

<sup>6</sup> See *Babbit*, 188 Wis. 2d at 355-57; *Dunn*, 158 Wis. 2d at 144-46.

¶15 In this case, Lewis was being abusive and uncooperative to Officer Piotrowski. Lewis had trouble with simple tasks like locating his driver's license. He also had a heavy odor of intoxicants, poor balance, and unzipped pants. Lewis went on to deny driving, even though he knew an officer had observed him driving and despite the fact that he had admitted that he was driving, only to deny it again when asked to perform field sobriety tests.

¶16 According to the above facts, it is clear that there was ample cause to arrest Lewis for operating a motor vehicle while intoxicated. The police officer observed him drive his vehicle to a complete stop in the middle of the roadway. The police officer smelled intoxicants on Lewis, and observed certain behaviors consistent with an intoxicated person. These factors, detailed earlier in this opinion, would permit any reasonable person to conclude that Lewis was operating a vehicle while intoxicated.

¶17 Lewis next contends that his refusal to take the field sobriety tests was reasonable. He argues that there was no probable cause for his arrest and therefore he had the right to refuse to take the field sobriety tests.

¶18 Because we have already determined that there was probable cause to arrest Lewis for operating a motor vehicle while intoxicated, it is not necessary to go into an in-depth analysis here. WISCONSIN STAT. § 343.305(2) provides:

Any person who ... drives or operates a motor vehicle upon the public highways of this state, or in those areas enumerated in s. 346.61, is 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, controlled substances ... or any combination of alcohol, controlled substances ... and other drugs, when requested to do so by a law enforcement officer under sub. (3) (a) or (am) or when required to do so under sub. (3) (b). Any such tests shall be administered upon the request of a law enforcement officer.

Because an officer witnessed Lewis driving, Lewis gave informed consent under WIS. STAT. § 343.305(2) and therefore, his refusal to consent to a field sobriety test was unreasonable and the order of revocation was appropriate.

*By the Court.*—Order affirmed.

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

