

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 21, 2003

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. 02-2917
STATE OF WISCONSIN**

Cir. Ct. No. 02-TR-4149

**IN COURT OF APPEALS
DISTRICT IV**

**IN THE MATTER OF THE REFUSAL OF DANIEL J.
BOHRINGER:**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DANIEL J. BOHRINGER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Jefferson County:
WILLIAM F. HUE, Judge. *Affirmed.*

¶1 VERGERONT, J.¹ Daniel J. Bohringer appeals an order of the trial court revoking his operating privileges for a period of one year based upon his

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

refusal to submit to a chemical test to determine his blood alcohol concentration as required by WIS. STAT. § 343.305. Bohringer makes two arguments on appeal: (1) the trial court erroneously determined that his refusal was unreasonable because the arresting officer failed to distinguish between the preliminary breath test and the breathalyzer test; and (2) the officer lacked reasonable suspicion to stop Bohringer's vehicle and lacked probable cause to arrest him for driving while under the influence of an intoxicant in violation of WIS. STAT. § 346.63(1)(a). We reject both arguments and affirm.

BACKGROUND

¶2 On the night of May 4, 2002, Wisconsin State Trooper Thomas Erdmann stopped a vehicle driven by Bohringer in the area of Concord Center Drive in Jefferson County, Wisconsin. Trooper Erdmann testified as follows at the refusal hearing. He stopped the vehicle after witnessing the driver make a wide left turn, coming to a stop before completing the turn, driving partly on the grass for 150 feet, and then waiting for an unusually long length of time at a stop sign. He smelled intoxicants on Bohringer's breath and put him through a series of field sobriety tests. Bohringer performed poorly on the tests. The officer asked Bohringer to give a preliminary breath test (PBT) sample, but Bohringer refused. Trooper Erdmann arrested Bohringer for operating a motor vehicle while under the influence of an intoxicant in violation of WIS. STAT. § 346.63(1)(a). After transporting Bohringer to the Oconomowoc Police Department, the officer read him the Informing the Accused form² and asked him to take a breath test.

² The pertinent section of the form reads:

(continued)

Bohringer refused. The officer asked if he would submit to a blood test, which Bohringer also refused.

¶3 Bohringer testified as follows. His manner of turning was a legitimate defensive maneuver to avoid Trooper Erdmann's car, which, Bohringer claimed, was coming down the other side of the narrow road at a high rate of speed. He, Bohringer, never came to a stop during the turn, did not leave the road, and did not drive on the grass shoulder at any time after completing the turn. He waited for five seconds at the stop sign to make sure there was no traffic coming through the intersection. At the police station, Trooper Erdmann asked if he "still refuse[d] to take the breath test," and Bohringer answered yes. Bohringer denied that Trooper Erdmann mentioned the option of a blood test. Bohringer does not have any physical problems that would prevent him from performing a breath test.

¶4 The trial court found that Trooper Erdmann read the Informing the Accused form to Bohringer, that Bohringer understood it, and that he made an informed, conscious decision not to take the breath test at the station.³ There was no evidence presented that Bohringer had a physical hardship that would prevent

This law enforcement agency now wants to test one or more samples of your breath, blood or urine to determine the concentration of alcohol or drugs in your system. If any test shows more alcohol in your system than the law permits while driving, your operating privilege will be suspended. If you refuse to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties. The test results or the fact that you refused testing can be used against you in court.

³ The trial court did not make an express finding whether Trooper Erdmann offered a blood test, as he testified he did, but which Bohringer disputed. It appears implicit in the court's statement that "swollen hands ... [have] nothing to do with taking a breath test or a blood test" that the court found Trooper Erdmann had offered a blood test. However, for purposes of this decision, we assume only a breath test was offered at the station.

him from taking the test. The trial court determined that Bohringer refused to take the test. The trial court also found that Bohringer made an abrupt turn not within his own lane of traffic, was slow in moving off the stop sign, denied going out drinking but smelled of intoxicants, had glassy eyes, walked with an unsteady gait, did not perform very well on the agility tests, and refused the PBT. The trial court concluded there was reasonable suspicion for the stop and probable cause for the arrest.

DISCUSSION

¶5 All drivers in Wisconsin impliedly consent to one or more tests of their breath, blood, or urine to determine blood alcohol content. WIS. STAT. § 343.305(2). If a driver refuses to provide the requested sample, the law enforcement officer must take the person's license and prepare a notice of intent to revoke. Section 343.305(9)(a). The driver may request a hearing to challenge the proposed revocation. Under § 343.305(9)(a)5 only the following issues may be considered at a refusal hearing: (1) whether the requesting officer had probable cause to believe that the person was driving under the influence of an intoxicant; (2) whether the officer complied with the information requirement of § 343.305(4); (3) whether the person refused to permit a blood, breath, or urine test; and (4) whether the refusal to submit to the test was due to a physical inability unrelated to the person's alcohol use. *State v. Schirmang*, 210 Wis. 2d 324, 329-30, 565 N.W.2d 225 (Ct. App. 1997).

¶6 Bohringer first contests the trial court's ruling that he refused to take the breath test at the station. He argues that Trooper Erdmann failed to distinguish between the PBT and the breathalyzer test offered at the station, leading him to believe that the officer was talking about the same test. In particular, Bohringer

contends he was not aware at the time of his refusal that there is no penalty for refusing the PBT under WIS. STAT. § 343.303, but, rather, the penalty of revocation attaches to refusing tests under WIS. STAT. § 343.305(9)(a). Because he reasonably assumed the tests were identical, Bohringer argues, he was not adequately informed of his rights under the implied consent statute and should not have his license revoked. Although Bohringer phrases this challenge in terms of the reasonableness of his refusal, we conclude that it is properly phrased as a challenge to the officer's compliance with § 343.305(4). There is no statutory provision allowing for a refusal as long as it is reasonable: the only situations in which a refusal is not grounds for revocation are those listed in § 343.305(9)(a).⁴

¶7 When the driver challenges the officer's compliance with WIS. STAT. § 343.305(4), the following standard applies. The accused driver must show: (1) the requesting officer either failed to meet or exceeded his duty to inform the accused under § 343.305(4); (2) this lack or oversupply of information was misleading; and (3) the officer's failure affected the accused driver's ability to make a choice about submitting to chemical testing. *See Schirmang*, 210 Wis. 2d at 330. The interpretation of § 343.305 and the statute's application to a set of facts is a question of law, which we review de novo. *State v. Sutton*, 177 Wis. 2d 709, 713, 503 N.W.2d 326 (Ct. App. 1993).

¶8 Applying the law to the facts of the present case, we agree with the trial court that Bohringer was properly informed under WIS. STAT. § 343.305(4). Trooper Erdmann read the Informing the Accused form to Bohringer. This form

⁴ We do not understand Bohringer to argue that he did not refuse to submit to a breath test at the station.

adequately warns the accused driver about the testing requirement and the consequences of refusing the test. *County of Ozaukee v. Quelle*, 198 Wis. 2d 269, 281, 542 N.W.2d 196 (Ct. App. 1995). While the implied consent statute distinguishes between the PBT and the breathalyzer test, drivers need not be informed of the distinction. *Quelle*, 198 Wis. 2d at 282 n.5. Bohringer's own subjective confusion is no defense. See *State v. Piddington*, 2001 WI 24, ¶21, 241 Wis. 2d 754, 774, 623 N.W.2d 528 (the determination of whether the officer reasonably conveyed the implied consent warning is based upon the objective conduct of the officer, not the comprehension of the accused driver). Bohringer has failed to show that Trooper Erdmann in any way failed to comply with § 343.305(4).

¶9 Next, Bohringer contends that the trial court erred in deciding that Trooper Erdmann had reasonable suspicion for the initial stop of Bohringer's vehicle and had probable cause to arrest him. Reasonable suspicion for the stop is not an issue at a refusal hearing, and we therefore limit our analysis to whether the officer had probable cause to believe the person was operating a vehicle while under the influence of an intoxicant. WIS. STAT. § 343.305(9)(a)5.a. To meet this standard at a refusal hearing, the State need only present evidence showing the officer's account is plausible. *State v. Wille*, 185 Wis. 2d 673, 681, 518 N.W.2d 325 (Ct. App. 1994). The court does not weigh the evidence for and against probable cause, does not determine the credibility of witnesses, and need not even believe the officer's story. *Id.*

¶10 We are satisfied that Trooper Erdmann had probable cause to believe Bohringer was driving while under the influence of an intoxicant. The officer testified that he believed Bohringer was driving while under the influence of an intoxicant because Bohringer made an unusual left-hand turn, drove on the grass,

stopped for a long time at a stop sign, smelled of intoxicants, and exhibited several clues of intoxication during his field sobriety tests. Bohringer argues that the officer lacked probable cause because Bohringer's way of turning was a legitimate defensive maneuver under the circumstances, and Bohringer points out that it is not illegal to stop for a long time at a stop sign. In addition, he argues that the field sobriety tests were not reliable and that the officer should have administered different tests. Bohringer's arguments are misplaced, because the court is not to weigh evidence for and against probable cause at a refusal hearing. *Wille*, 185 Wis. 2d at 681. We conclude Trooper Erdmann presented a plausible account and satisfied the probable cause standard applicable at a refusal hearing.

By the Court.—Order affirmed.

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

