COURT OF APPEALS
DECISION
DATED AND FILED

April 9, 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. 02-2924

Cir. Ct. No. 02-TR-6644

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MONTE J. HEPHNER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Sheboygan County: GARY LANGHOFF, Judge. *Affirmed.*

¶1 SNYDER, J.[1] Monte J. Hephner appeals from an order finding his refusal to submit to a chemical test pursuant to WIS. STAT. § 343.305 unreasonable. Hephner argues that he did not refuse to take a chemical test because the officer lacked probable cause to arrest him for operating a motor

[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.

vehicle while intoxicated (OWI). Furthermore, Hephner argues that he was unaware of his rights contained in the Informing the Accused form and thus could not have refused. We disagree with both of these contentions and affirm the order.

FACTS

¶2 On June 8, 2002, shortly after 10:00 p.m., Hephner was involved in a traffic accident on the off-ramp of Interstate 43 in Sheboygan county where the interstate intersects with State Highway 23. Hephner drove his motorcycle into the back of a pickup truck driven by another motorist. City of Sheboygan police responded to the accident and found Hephner lying in the roadway, being attended by emergency personnel. When Sheboygan police officer Mark Vigliette first responded to the accident, he smelled the odor of alcohol on Hephner's person from a distance of about two feet and Hephner consistently responded to Vigliette with belligerence and hostility. Vigliette decided to investigate the possibility that Hephner had been driving while under the influence of alcohol at the time of the accident.

¶3 Hephner was transported to the hospital, where it was discovered he suffered from facial lacerations, a broken jaw, a broken clavicle, a broken sternum, shoulder injuries and "road rash." When Vigliette arrived at the hospital almost immediately after Hephner, he noted that the entire emergency room smelled of alcohol; in addition, he noted that Hephner's words were slurred, his eyes bloodshot and his belligerence and profanity toward the officer unabated. This response differed from Hephner's general cooperation with medical personnel.

¶4 Based upon the above factors, Vigliette decided to place Hephner under arrest for OWI. Vigliette read Hephner the Informing the Accused form and asked him if he would submit to a chemical test of his blood. Hephner's response

was "fuck you and fuck this" and numerous other profanities. Vigliette understood this response to mean "no." Hephner indicates that he has no memory of Vigliette's request. Hephner was charged with refusing to submit to a chemical test.

¶5 A refusal hearing was held on August 29, 2002. Both Vigliette and Hephner testified at this hearing. At the close of the hearing, the circuit court concluded that there was probable cause to believe Hephner had been operating a motor vehicle while intoxicated, there was probable cause to believe that Hephner had been informed of his rights under the Implied Consent statute and Hephner had refused to submit to the chemical test. The court revoked Hephner's driver's license for one year. Hephner appeals.

DISCUSSION

¶6 Hephner argues that he did not refuse to take a chemical test because the officer lacked probable cause to arrest him for OWI. We reject this argument.

¶7 We review a probable cause determination de novo. ***State v. Babbitt***, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994). The test for probable cause is a low standard. Probable cause will be found "where the totality of the circumstances within the arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe ... that the defendant was operating a motor vehicle while under the influence of an intoxicant." ***State v. Nordness***, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986). This is a commonsense test. It is based on probabilities. The facts need only be sufficient to lead a reasonable officer to believe that guilt is more than a possibility. ***County of Dane v. Sharpee***, 154 Wis. 2d 515, 518, 453 N.W.2d 508 (Ct. App. 1990).

¶8 Hephner drove his motorcycle into the back of a pickup truck. At the scene of the accident, Vigliette smelled the odor of alcohol on Hephner's person from a distance of about two feet and Hephner consistently responded to Vigliette with belligerence and hostility. When Vigliette arrived at the hospital almost immediately after Hephner, he noted that the entire emergency room smelled of alcohol. Hephner's speech was slurred, his eyes bloodshot and his belligerence and profanity toward the officer unabated. This response differed from Hephner's general cooperation with medical personnel. This is more than sufficient evidence to constitute probable cause to arrest for OWI.

¶9 Hephner also argues that he was unaware of his rights contained in the Informing the Accused form and thus could not have refused. He specifically argues that it was unreasonable for Vigliette to read him the Informing the Accused form while being treated in the emergency room. We reject this argument as well.

¶10 First, WIS. STAT. § 343.305(9)(a)5.c states that the issues at a refusal hearing are limited to, among other things:

> Whether the person refused to permit the test. The person shall not be considered to have refused the test if it is shown by a preponderance of evidence that the refusal was due to a physical inability to submit to the test due to a physical disability or disease unrelated to the use of alcohol, controlled substances, controlled substance analogs or other drugs.

In other words, any failure to submit to a chemical test other than a physical inability is an improper refusal. ***State v. Rydeski***, 214 Wis. 2d 101, 106, 571 N.W.2d 417 (Ct. App. 1997). Nowhere in his brief does Hephner allege that he was physically unable to submit to the chemical test.

¶11 The circuit court made a specific factual finding that Vigliette read Hephner the Informing the Accused form. The court also found that while Hephner responded appropriately to help from medical personnel, he responded inappropriately to Vigliette, "was totally uncooperative with the officer and totally disrespectful to the officer." The court found that Hephner "was conscious and aware of what was occurring during his encounter with police at the emergency room [and] ... was aware of the request being made of him." The court found Vigliette's testimony "highly credible and much more credible than" Hephner's testimony. A trial court's factual findings must be upheld unless they are clearly erroneous. *See* ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987).

¶12 We conclude that the officer did have probable cause to arrest Hephner for OWI and that Hephner's refusal to submit to a chemical test was improper. We therefore affirm the order of the circuit court.

By the Court.—Order affirmed.

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