

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 1, 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. 02-3018-CR  
STATE OF WISCONSIN**

Cir. Ct. No. 01-CT-321

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**STEVEN W. NIELSON,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Sauk County: PATRICK TAGGART, Judge. *Affirmed.*

¶1 ROGGENSACK, J.<sup>1</sup> Steven W. Nielson appeals the circuit court's order denying his motion to suppress evidence obtained from a preliminary breath

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2001-02). Additionally, all further references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

test and the subsequent judgment of conviction for operating a motor vehicle while having a prohibited alcohol concentration, contrary to WIS. STAT. § 346.63(1)(b), third offense. Because we conclude that the arresting officer had probable cause to believe Nielson was operating a motor vehicle while intoxicated (OMVWI) and therefore, appropriately requested a preliminary breath test, and because Nielson consented to that test, we affirm the judgment and order of the circuit court.

### **BACKGROUND**

¶2 On August 19, 2001, at approximately at 2:00 a.m., Sauk County Deputy Sheriff Jon Hanson clocked Nielson operating a motorcycle at seventy-three miles per hour in a fifty-five mile per hour zone. Hanson stopped Nielson for speeding. When Nielson got off his motorcycle and approached, Hanson noticed that his eyes were red and bloodshot, that his speech was slurred, that he had an odor of intoxicants about him, and upon questioning, Nielson admitted that he had had “a couple of beers.” Based on that contact, Hanson requested Nielson to complete field sobriety tests.

¶3 Nielson had a small amount of difficulty with the alphabet test, but failed the one-leg stand test. Hanson, a fourteen-year law enforcement veteran with approximately eleven years as a road patrol officer, believed that Nielson was impaired and asked him to take a preliminary breath test by blowing into a device. Nielson did so. The preliminary breath test revealed an alcohol concentration of .15, and Nielson was then arrested for OMVWI, third offense. A subsequent blood test yielded an alcohol concentration of .191 and Nielson was cited for operating with a prohibited alcohol concentration (PAC).

¶4 Nielson moved to suppress the results of the breath test and the circuit court denied his motion. A jury found him guilty of both OMVWI and

operating a vehicle with a PAC. The circuit court entered a conviction for PAC, a violation of WIS. STAT. § 346.63(1)(b), third offense.

## DISCUSSION

### **Standard of Review.**

¶5 The circuit court's findings relative to whether Hanson had probable cause to request a preliminary breath test and whether Nielson consented to taking the test are drawn from Hanson's observations, as he was the only witness at the suppression hearing. We will not overturn factual findings of the circuit court unless they are clearly erroneous. *State v. Richardson*, 156 Wis. 2d 128, 137, 456 N.W.2d 830, 833 (1990). However, whether the facts as found are sufficient to satisfy a statutory standard and whether a defendant's consent was voluntary are questions of law that we review *de novo*. *County of Jefferson v. Renz*, 231 Wis. 2d 293, 316, 603 N.W.2d 541, 552 (1999); *State v. Phillips*, 218 Wis. 2d 180, 197-98, 577 N.W.2d 794, 802 (1998).

### **Probable Cause Required By WIS. STAT. § 343.303.**

¶6 Nielson challenges whether there was probable cause for the officer to request a preliminary breath test pursuant to WIS. STAT. § 343.303. The supreme court has interpreted the level of probable cause required for an officer to request a preliminary breath test under § 343.303 as a lesser amount of proof than probable cause to arrest. *Renz*, 231 Wis. 2d at 315-16, 603 N.W.2d at 551-52. A driver can refuse to take a preliminary breath test, but if he does so, the refusal can be used as an inference of guilt. *State v. Babbitt*, 188 Wis. 2d 349, 358, 525 N.W.2d 102, 105 (Ct. App. 1994).

¶7 Prior to requesting the preliminary breath test, Hanson noticed that Nielson was driving seventeen miles an hour over the posted speed limit, an event that occurred shortly after bar time. He also noted that Nielson's eyes were red and bloodshot, he had the odor of intoxicants about him, his speech was slurred and he admitted to drinking. Nielson had also failed the one-leg stand test and had had some confusion about how to order the letter "p" in the alphabet test. These facts were noticed by an officer who had more than eleven years of highway patrol experience, had stopped many drivers in the past and who testified that he believed Nielson was driving while intoxicated. We conclude that these facts were sufficient to satisfy the statutory level of probable cause required by WIS. STAT. § 343.303 in order to request Nielson to take a preliminary breath test.

**Consent.**

¶8 Nielson contends that he did not consent, in a constitutional sense, to take the preliminary breath test. Taking one's breath for a preliminary breath test is a search under the Fourth Amendment. *County of Milwaukee v. Proegler*, 95 Wis. 2d 614, 623, 291 N.W.2d 608, 612 (Ct. App. 1980). For a search pursuant to consent to be constitutionally permissible, the consent must be voluntary as determined by the totality of the circumstances. *State v. Rodgers*, 119 Wis. 2d 102, 114, 349 N.W.2d 453, 459 (1984). Therefore, when the State relies on consent for a search, it must prove by clear and convincing evidence that the consent was voluntarily given and not the product of duress or coercion. *See id.* As part of the totality of the circumstances reviewed when consent is questioned, we recognize that police need to be able to seek cooperation of and ask questions of individuals and that seeking cooperation is not equivalent to coercion. *See State v. Stankus*, 220 Wis. 2d 232, 239, 582 N.W.2d 468, 471 (Ct. App. 1998).

And finally, consent need not be verbally given; it may be evidenced by conduct. *Phillips*, 218 Wis. 2d at 197, 577 N.W.2d at 802.

¶9 Here, the interaction between Nielson and Hanson was described as cooperative in all respects, not just the blowing into a device to obtain the preliminary breath test. There is no evidence in the record of any type of coercion or duress placed upon Nielson to get him to perform the preliminary breath test, nor does Nielson suggest that there was. Hanson simply handed the preliminary breath test device to Nielson and asked him to blow into it, and Nielson did so. Accordingly, we conclude that the finding of historic fact that Nielson consented is not clearly erroneous and the constitutional finding that consent was given is supported by ample evidence to meet the State's burden of proof by clear and convincing evidence.<sup>2</sup>

## CONCLUSION

¶10 We conclude that the arresting officer had probable cause to believe Nielson was OMVWI and therefore, appropriately requested a preliminary breath test, and because Nielson consented to that test, we affirm the order and judgment of the circuit court.

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

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

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<sup>2</sup> Because we have concluded that there was no error in the circuit court's factual and constitutional findings of consent, we do not address Nielson's constitutional argument that is grounded on deficiencies that may have been present, if there were a lack of consent.



