COURT OF APPEALS
DECISION
DATED AND FILED

March 26, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-3111-FT **Cir. Ct. No. 02-TR-3126**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

CITY OF OSHKOSH,

PLAINTIFF-RESPONDENT,

V.

CHRISTINE K. PALECEK-BAERWALD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: WILLIAM H. CARVER, Judge. *Affirmed.*

¶1 NETTESHEIM, P.J.[1] Christine K. Palecek-Baerwald appeals from a forfeiture judgment of conviction for operating a motor vehicle while intoxicated (OWI), as a first offense, contrary to WIS. STAT. § 346.63(1)(a). She contends that

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

the trial court afforded too much weight to the preliminary breath test (PBT) results in determining the existence of probable cause.

¶2 We conclude, based on WIS. STAT. § 343.303 and our supreme court's holding in ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 603 N.W.2d 541 (1999), that the trial court properly considered the PBT results in determining probable cause to arrest. We further conclude that the trial court's determination of probable cause rested on the totality of the circumstances and not, as Palecek-Baerwald asserts, exclusively on the PBT results. We affirm.

FACTS

¶3 Palecek-Baerwald was cited for OWI on March 16, 2002. She filed a motion to suppress evidence on June 5, 2002. At the hearing on the motion, Officer Jody Brieder of the City of Oshkosh Police Department testified that on March 16, 2002, at 1:54 a.m., he observed the vehicle driven by Palecek-Baerwald take a wide turn, coming "very close to the center line." Palecek-Baerwald was traveling in the opposite direction of Brieder, who watched Palecek-Baerwald's vehicle in his rearview mirror "weaving back and forth … and getting close to the center line." Brieder turned around to follow Palecek-Baerwald's vehicle which continued to weave. When the vehicle approached an intersection where the road divides into a number of different lanes, it "came to almost a dead stop in the middle of the road." The lights at the intersection were flashing yellow at the time. The vehicle then went into the right-turn lane and turned right, making a wide turn and touching the white dotted line twice and the center line once. The vehicle stayed within its traffic lane.

¶4 After observing the vehicle weave through two more turns and travel in the wrong lane of traffic for a short period of time, Brieder initiated a traffic

stop. Brieder made contact with the driver, later identified as Palecek-Baerwald, and noted the odor of intoxicants coming from the vehicle. He additionally detected that Palecek-Baerwald had slurred speech and glassy eyes. Palecek-Baerwald testified that she informed Brieder that she had been drinking a beer approximately every thirty to forty-five minutes from 7:30 p.m. until 12:30 a.m.

¶5 Brieder asked Palecek-Baerwald to do field sobriety tests. Brieder administered the horizontal gaze nystagmus (HGN) test and observed all six clues of intoxication. Palecek-Baerwald additionally failed the other tests—the "walk-and-turn" test, the "one-leg stand" and the counting test. Brieder then administered a PBT which indicated a blood alcohol level of .178 grams. Brieder placed Palecek-Baerwald under arrest for OWI.

¶6 The trial court denied Palecek-Baerwald's motion to suppress. In making its determination, the trial court noted that Brieder observed "what he felt was inappropriate, erratic type driving," which in the court's opinion provided an appropriate reason to stop the vehicle. The court also noted the odor of intoxicants and Palecek-Baerwald's admission that she had been consuming alcohol.

¶7 With respect to the field sobriety tests, the court stated: "Now, these tests I recognize are very difficult tests for even sober people to do…. I don't give a great deal of deference to these tests individually…. I look at an overall observation of the officer." The court then noted that Palecek-Baerwald "was able to reasonably do these tests." Finally the court stated:

> [T]he final blow is now they all ask individuals to take a PBT test …. [T]his is a scientific test, has a great deal of persuasive power to the Court, and a person comes and tests .17…. I might just hypothetically if this test came back at a .10 or a .09 with a reasonable degree of performance on these physical tests, not any outrageous driving, things of that nature, this case could possibly and

> potentially be turned around to a lack of probable cause, but when I put all of these things together—and these are not things that this Court makes up, these are things that the legislature put out there and the things that the appellate courts told us to do, to look at the entire set of circumstances, and determine whether or not there is probable cause for this officer to take this defendant to the police station to submit to the required tests. And I have to find based on these comments here, the putting everything together, the officer did have probable cause to arrest the defendant and I put great weight on the PBT test as well as the overall observations of the officer at the scene.

A pro-forma trial was held on August 26, 2002, at which Palecek-Baerwald was found guilty of OWI.[2]

¶8 Palecek-Baerwald appeals.

DISCUSSION

¶9 Based on the trial court's statements regarding the PBT test, Palecek-Baerwald argues that the trial court erroneously found that probable cause existed to arrest her because the trial court acknowledged that her allegedly poor driving and poor performance on the field sobriety tests were not sufficient to arrest, and "in placing all of its stock in the PBT test, relied on it in a way which is not permitted and which undermined the fourth amendment's probable cause standard."

¶10 The appellate court will uphold the trial court's findings of fact if the findings are not clearly erroneous. ***State v. Roberts***, 196 Wis. 2d 445, 452, 538 N.W.2d 825 (Ct. App. 1995). However, whether a set of facts constitutes probable

[2] Palecek-Baerwald was additionally cited for and found guilty of operating a motor vehicle with a prohibited alcohol concentration. That charge is not a subject of this appeal as judgment was entered only on the OWI charge.

cause is a question of law that the court of appeals will review de novo. *See* ***State v. Babbitt***, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994). To determine if probable cause exists, the court must consider whether "the totality of the circumstances 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). The threshold to establish probable cause is low; it is only necessary that the evidence "lead a reasonable officer to believe that guilt is more than a possibility." ***State v. Paszek***, 50 Wis. 2d 619, 625, 184 N.W.2d 836 (1971).

¶11 We begin by rejecting Palecek-Baerwald's assertion that the trial court placed "all of its stock" in the PBT test. True, the trial court made certain statements indicating an institutional bias against the accuracy of field sobriety tests and that Palecek-Baerwald's erratic driving was not "critical." However, the trial court went on to explain that while each of these things—erratic driving and failing field sobriety tests—standing alone would not be enough to find probable cause in this case, when taken together and coupled with the admission of alcohol consumption, Brieder's observations including odor of intoxicants, slurred speech and glassy eyes and the PBT test result, there was sufficient evidence to support a finding of probable cause. While the trial court did put "great weight" on the PBT test, the court also relied on other evidence bearing on probable cause.

¶12 Next, we turn to Palecek-Baerwald's objection to the trial court's reliance on the PBT test result of .178. In support of her argument, Palecek-Baerwald notes the trial court's statement that if the result of the PBT test had been .10 or .09, "this case could possibly and potentially be turned around to a lack of probable cause." Palecek-Baerwald argues that in relying on the exact

reading of the PBT, the trial court treated the PBT as a "quantitative breath alcohol analysis" as opposed to a "qualitative breath alcohol analysis."

¶13 WISCONSIN ADMIN. CODE § TRANS 311.03(12) and (13), respectively, define a "qualitative breath alcohol analysis" as a "test of a person's breath, the results of which indicate the presence or absence of alcohol" and a "quantitative breath alcohol analysis" as "a chemical test of a person's breath which yields a specific result in grams of alcohol per 210 liters of breath." Based on these definitions, Palecek-Baerwald asserts that the PBT, as a qualitative breath alcohol analysis, informs only as to the presence or absence of alcohol, not as to the amount of alcohol. As such, Palecek-Baerwald argues that the .17 qualitative reading of the PBT was of no consequence in this case and that the trial court therefore erred in placing "great weight" on the PBT result.

¶14 While the State does not disagree that the PBT is a qualitative test, it argues that both the PBT statute, WIS. STAT. § 343.303, and ***Renz*** indicate that the results of the PBT are admissible to establish probable cause to arrest. We agree.

¶15 WISCONSIN STAT. § 343.303 governs the preliminary breath screening test. It provides in relevant part:

> 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 …. The result of the preliminary breath screening test shall not be admissible in any action or proceeding except to show probable cause for arrest, if the arrest is challenged, or to prove that a chemical test was properly required or requested of a person under s. 343.305(3).

Sec. 343.303 (emphasis added). This statute speaks of the "result" of the PBT. Here it is undisputed that the result yielded by the PBT was .17. While the administrative code says that a qualitative breath alcohol test will reveal whether

alcohol is present, the fact remains that the PBT yields a specific numeric result which represents the concentration of alcohol. Although the PBT is not as reliable as the breathalyzer quantitative test and therefore is not admissible except on the question of probable cause, the statute nonetheless authorizes a law enforcement officer to utilize the PBT result in making the arrest determination. From that it follows that a trial court can also use that evidence when assessing whether the arrest was supported by probable cause. ***Renz***, 231 Wis. 2d at 304. In addition, the weight to be accorded such evidence is for the trial court in its role as the fact-finder. ***State ex rel. T.R.S. v. L.F.E.***, 125 Wis. 2d 399, 401, 373 N.W.2d 55 (Ct. App. 1985).

¶16 This interpretation of WIS. STAT. § 343.303 is confirmed by ***Renz***, where the supreme court held that an officer need not have probable cause to arrest prior to requesting a PBT. ***Renz***, 231 Wis. 2d at 295. In arriving at its decision, the court considered the purpose of § 343.303 and the PBT, stating that this interpretation "maximizes highway safety, because it makes the PBT an effective tool for law enforcement officers investigating possible OWI violations. It also encourages vigorous prosecution of OWI violations, *because it allows PBT results to be used to show the existence of probable cause for an arrest*." ***Renz***, 231 Wis. 2d at 315 (emphasis added).

¶17 In ***Renz***, the officer stopped the defendant for an exhaust system violation. ***Id.*** at 296. When the officer made contact with the defendant, he noted a strong odor of intoxicants coming from inside the defendant's vehicle. ***Id***. When the officer inquired whether the defendant had been drinking, the defendant indicated that he was a bartender at a tavern and had drunk three beers earlier in the evening. ***Id***. The defendant submitted to field sobriety testing and was able to substantially complete all of the tests. ***Id***. at 316-17. At no time during the testing

or throughout the defendant's conversations with the officer was his speech slurred. ***Id***. at 297, 317. The defendant submitted to a PBT, which indicated a blood alcohol level of .18. ***Id***. at 298-99.

¶18 In considering the propriety of the officer's use of a PBT, the ***Renz*** court observed that "[t]he 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." ***Id***. at 317. It is evident from the facts of ***Renz*** that prior to administering the PBT, the officer knew that some amount of alcohol was present in the defendant's blood—both by the defendant's admission and the odor of intoxicants emanating from his vehicle. The defendant in ***Renz*** exhibited even fewer indicia of intoxication than Palecek-Baerwald, making the numeric result of the PBT that much more useful in determining probable cause.[3]

¶19 Here, we conclude that the trial court properly found that there was probable cause to arrest Palecek-Baerwald for OWI. The trial court found that Brieder observed what he felt was "inappropriate, erratic type driving"; Brieder smelled alcoholic beverages; Palecek-Baerwald indicated to Brieder that she had been consuming alcoholic beverages; and that the PBT indicated a result of .178. Although the trial court found that Palecek-Baerwald was able to "reasonably" do the field sobriety tests, the facts as found by the trial court, including Brieder's observations of Palecek-Baerwald's slurred speech and glassy eyes, and the PBT

[3] Unlike Palecek-Baerwald, the defendant in ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 603 N.W.2d 541 (1999), was stopped for vehicle problems as opposed to erratic driving. He did not have slurred speech or glassy eyes and he was able to substantially complete the sobriety testing.

result provide sufficient basis to support a determination of probable cause.[4] *See* ***State v. Wille***, 185 Wis. 2d 673, 684, 518 N.W.2d 325 (Ct. App. 1994) (field sobriety test not always required in order to find probable cause).

CONCLUSION

¶20 We conclude that the trial court properly considered the results of the PBT in determining probable cause to arrest. We affirm the judgment.

By the Court.—Judgment affirmed.

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

[4] Given the trial court's finding that Palecek-Baerwald performed reasonably well on the field sobriety tests, we do not address her challenge to the trial court's finding of probable cause based on her testimony at the suppression hearing that, contrary to the National Highway Traffic Safety Administration procedures set forth in the field sobriety training manual, Brieder did not offer Palecek-Baerwald the opportunity to remove her shoes even though they had heels in excess of two inches.