COURT OF APPEALS
DECISION
DATED AND FILED

June 30, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2899 **Cir. Ct. No. 2008TR1813R**

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

IN THE MATTER OF THE REFUSAL OF RYAN STEFAN ROBERTS:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RYAN STEFAN ROBERTS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Columbia County: DANIEL GEORGE, Judge. *Affirmed.*

¶1 BLANCHARD, J.[1] Ryan Roberts appeals a judgment imposing a twelve-month revocation of his operating privileges, pursuant to WIS. STAT. § 343.305(10), upon a determination that he unreasonably refused to submit to a chemical test of his breath for intoxication, as provided in § 343.305(3)(a), under Wisconsin's implied consent law.

¶2 Roberts contends that: (1) the trial court erred in concluding that the State established that the trooper had sufficient probable cause to justify the administration of a preliminary breath test (PBT), under ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 603 N.W.2d 541 (1999); (2) the trial court erred in failing to address whether the State failed to meet a burden—which Roberts asserts the State had, as part of its obligation to prove that the trooper had probable cause to believe that Roberts was operating while under the influence of alcohol (OWI) or with a prohibited alcohol concentration—of establishing that the PBT used by the trooper was one approved by the Wisconsin Department of Transportation (DOT); and (3) the trial court erred in concluding that Roberts unreasonably refused to submit to the requested breath test.[2] The record supports the circuit court's decisions, and therefore the judgment is affirmed.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2009-10) (as an appeal of a case "under s. 343.305"). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] Roberts identifies as a separate issue on appeal the question of whether the circuit court made findings and reached legal conclusions with sufficient clarity to permit judicial review, citing ***State v. Arends***, 2010 WI 46, ¶47, 325 Wis. 2d 1, 784 N.W.2d 513. However, Roberts ultimately appears to request only that this court review the record and remand for any *necessary* factual findings, which is only a statement of what the law requires. Therefore, this court will not treat this as a separate issue on appeal, but instead will consider these arguments in the context of the substantive issues raised on appeal.

BACKGROUND

Testimony of Trooper at Refusal Hearing

¶3 A state trooper stopped Roberts' vehicle at 11:47 p.m. after clocking it, with a laser, travelling 81 miles per hour in a 65 m.p.h. zone. Roberts was the driver. Roberts admitted to the trooper that he had been driving about 80 m.p.h.[3]

¶4 The trooper approached the passenger side of the vehicle, and a window was lowered. The trooper could smell an "overwhelming" odor of "freshly sprayed air freshener." The trooper concluded that Roberts or his passenger had sprayed air freshener in the car. The trooper did not notice Roberts fumble in retrieving his driver's license.

¶5 The trooper had Roberts get out of the vehicle, in order to explain the speeding ticket to him. The trooper did not observe Roberts move in an unsteady manner when getting out of the vehicle. As the two men stood a "couple feet" apart, the trooper "could smell a strong odor of intoxicants on his breath." The trooper noticed that Roberts had "slightly bloodshot eyes."

¶6 When the trooper asked if he had been drinking, Roberts responded that he had had two or three drinks, "a couple of crown and sevens [whiskey drinks] and a [S]potted [C]ow [beer]" in Dane County, having consumed the last drink approximately forty-five minutes before the traffic stop.

[3] Other than driving sixteen miles over the speed limit, the record does not reflect evidence of driving behavior by Roberts that night that was unlawful or that suggested impaired driving.

¶7 The trooper had Roberts perform the following field sobriety tests: the Horizontal Gaze Nystagmus (HGN) (in which Roberts exhibited two of six clues), the walk and turn (none of the eight clues exhibited), and the one-leg stand (one of four clues, the clue involving his raising his arms to balance himself). The trooper believed that the minimum clues to conclude that someone is likely over a blood alcohol level of .10 were four of six for the HGN, two of eight for the walk and turn, and two of four for the one-leg stand. However, the trooper did not believe it was a question of concluding whether Roberts had passed or failed any particular aspect of any test, but instead a question of how many clues were exhibited in the totality of the circumstances. During the field sobriety tests, the headlights of the trooper's squad car were not pointed at Roberts' face, and both its spotlight and flashing lights were turned off.

¶8 Based on the clues given during the field sobriety tests, the odor of intoxicants coming from Roberts, his admission of drinking, and the slightly bloodshot eyes, the trooper asked Roberts to perform a preliminary breath test. At first, Roberts blew only short, quick breaths, instead of the required long, steady blow, and so the trooper had him make "a few tries." This at first yielded no reading at all on the PBT (not even a reading of "zero"). However, it eventually yielded a reading of a blood alcohol level of .109. The trooper placed Roberts under arrest for OWI.

¶9 The trooper brought Roberts to the county jail for an intoximeter test. At approximately 12:38 a.m., the trooper read to Roberts from the DOT's Informing the Accused form. *See* WIS. STAT. § 343.305(4). The trooper asked Roberts if he would submit to an evidentiary chemical test of his breath. Roberts replied in the negative. After the completion of the twenty-minute observation period, when the intoximeter was ready to receive a sample, the trooper asked

again if Roberts would give a sample, and Roberts responded, "I refuse." The trooper testified that he did not believe that Roberts gave any reason for refusing the breath test.

Testimony of Roberts at Refusal Hearing

¶10 Roberts arose at about 6:00 a.m. that morning and flew to Wisconsin from Texas to start a new job the next day in Columbia County.[4] Roberts drank "a couple of crown and sevens" and "a sip of [S]potted [C]ow" beer at a Dane County bar between 7:00 p.m. and 9:00 p.m. When Roberts and a friend left this bar at around 10:30 p.m. or 10:45 p.m., to drive to Columbia County, Roberts volunteered to drive, because Roberts did not feel impaired. In contrast, Roberts' friend had drunk too much alcohol to drive safely. Roberts was tired from flying all day.

¶11 When the trooper pulled him over for speeding, Roberts admitted that he had been speeding. There was an air freshener attached to a vent of the vehicle that gave off an odor, but neither Roberts nor his friend did anything that night to make the scent stronger. Roberts told the trooper that he had consumed a couple of drinks that night.

¶12 Regarding the field sobriety tests, Roberts asked the trooper if he had to take them, the trooper said yes, and Roberts cooperated in performing all of them.[5] It was approximately ten or twenty degrees Fahrenheit on the side of the

[4] Roberts suggested in his testimony that his eyes were red at the time of the traffic stop because he had been wearing contact lenses over the course of a long day.

[5] At the refusal hearing, Roberts called Mary Catherine McMurray as an expert regarding field sobriety tests. McMurray testified, in part, that there has "never been ... experimentation to (continued)

highway, and Roberts, who as noted above had woken up in Texas that March morning, was wearing only thin clothing, until eventually the trooper allowed him to put on a jacket.[6] During the field sobriety tests, which were conducted in front of the trooper's squad car, "the spotlights" and the "blinking ... emergency type lights" were on, illuminating the area in which the tests were conducted.[7]

¶13 After administering these tests, the trooper asked Roberts to "take a Breathalyzer." When Roberts protested that there was no reason for this, because he was not drunk, the trooper said he would take Roberts to jail if he did not take this test. Roberts blew into the device and Roberts observed that it "registered a zero." Roberts knew how to read the device, because he had owned one for recreational use. The trooper instructed him to blow repeatedly into the device, which he did, after which the trooper placed him under arrest.

¶14 After the trooper took Roberts into custody, the trooper asked Roberts if he "wanted to take another Breathalyzer." "I said, no, you know, I do not want to take one. I already took one. I do not understand why I need to take another one because that didn't make any sense to me." The trooper may or may

---

show that" the total of three clues testified to by the trooper in this case "would even have a 50 percent reliability" in indicating a blood alcohol level of .08.

[6] McMurray suggested that one has "much less balance" in trying to stand on one leg when one is "extremely cold."

[7] McMurray testified, "If the flashing lights, the rotating lights[,] were on, it could trigger what's known as an optokinetic nystagmus. That's a nystagmus where you are looking at a focal point, but there is something moving in and out of your field of vision, which flashing lights would qualify as that. That alone can trigger what looks like a nystagmus," and yield false clues of intoxication.

not have read the Informing the Accused form to him, but in any case Roberts did not understand, while he was in custody, what the form states.[8]

Circuit Court Ruling at Refusal Hearing

¶15 Roberts requested a hearing regarding his revocation. Following the taking of evidence summarized above, the circuit court concluded that the State demonstrated that the trooper had probable cause to believe that the defendant operated under the influence, that there was evidence to support the fact that the trooper read the Informing the Accused form to Roberts, and that Roberts unreasonably refused to submit to a chemical test. The court concluded that "there is no defense with respect to any ... reason for not submitting to the chemical test" and found "all issues adverse to the defendant."

DISCUSSION

"Probable Cause to Believe" Sufficient to Support PBT Request

¶16 Relying on WIS. STAT. § 343.303,[9] as interpreted in ***Renz***, 231 Wis. 2d 293, Roberts contends that the State failed to show that the trooper had "probable cause to believe" that Roberts was operating under the influence or had a prohibited alcohol concentration before conducting the PBT test. For the reasons that follow, this court concludes that at the time the trooper asked Roberts

[8] Roberts' testimony about whether the trooper read the form to him was inconsistent. He testified that the trooper did not do so, but also implied that the trooper might have done so, and further suggested that, if the trooper did read from the form, Roberts missed it because he was not paying attention ("I didn't pay attention [to] everything").

[9] WIS. STAT. § 343.303 addresses the option of an officer, pre-arrest, to ask a driver to blow into a PBT, and then use the results to decide whether to make an arrest or to require a chemical test under § 343.305(3).

to take the PBT, the trooper's knowledge fell into the grey area between reasonable suspicion to stop and probable cause for an arrest that justifies giving a PBT under ***Renz***.

¶17 In this context, this court will "uphold the trial court's findings of fact unless they are clearly erroneous. Whether those facts satisfy the statutory standard of probable cause is a question of law we review de novo." ***Id.*** at 316 (citations omitted) (concluding as a matter of law that investigating officer had probable cause to request a PBT).

¶18 Our supreme court in ***Renz*** addressed the meaning of the phrase "probable cause to believe" that a driver is intoxicated under WIS. STAT. § 343.303, which defines the quantum of evidence necessary before a police officer may ask a motorist to take a PBT. The court concluded that the legislature determined that police should be able to use PBTs as preliminary screening tools when police lack the probable cause necessary to make an arrest, but at the same time the phrase "probable cause to believe" in § 343.303 must be given some meaning. ***Id.*** Based on its review of the context, history, and purpose of § 343.303, the court concluded that the quantum of proof necessary for a PBT request is a level "greater than the reasonable suspicion necessary to justify an investigative stop, ... but less than the level of proof required to establish probable cause for arrest." ***Id.***

¶19 Roberts argues that the record establishes that the trooper "had only a suspicion" that Roberts was operating under the influence, and not "probable cause to believe" that he was, in the ***Renz*** meaning of that phrase. Roberts

emphasizes that his performance in the field sobriety tests was more successful than that demonstrated by Renz,[10] and also more successful than was demonstrated by other motorists in other published opinions in which "probable cause to believe" has been found. Roberts also notes the lack of evidence of bad driving that could readily be associated with impairment, which differentiates this case from those in which, for example, the traffic stop results from unprompted swerving or other erratic driving behavior.

¶20 However, the facts in ***Renz*** are fairly comparable to the facts here. Like Roberts, Renz was stopped for a reason unrelated to an OWI violation and admitted to consuming alcohol earlier (three beers in ***Renz***, as opposed to two hard drinks and a beer in this case). *See* ***id.*** at 296. Also as in the case at bar, the investigating officer in ***Renz*** detected a strong odor of intoxicants; in Renz's case coming from inside the vehicle, in this case the odor emanated directly from Roberts, a fact that is more incriminating than in ***Renz***. *See* ***id.***

¶21 As for the field sobriety test results, Roberts did not score perfectly or imperfectly; as the trooper testified, his three failures add something, although perhaps not much, to the total picture. The circuit court did not explicitly address the expert defense testimony about how flashing lights *could* skew an HGN test, but the testimony of the trooper would support a finding that the lights were not a factor. The court was free to give the expert testimony whatever weight the court

[10] During the finger-to-nose test, Renz touched the bridge of his nose instead of the tip; he stepped off the line during the heel-to-toes walking test, and left a half an inch to an inch between his heel and his toes; he could not keep his foot raised from the ground for the full thirty seconds during the one-legged stand test; and he showed all six clues of intoxication associated with the HGN test. ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 297-98, 603 N.W.2d 541 (1999).

believed it merited. On balance, all evidence presented to the court regarding the field sobriety test results could be said to have added small data points hinting at impairment.

¶22 However, when the following factors are combined, the totality of the facts support a conclusion that the trooper had reached the gray area of "probable cause to believe," and therefore was authorized to administer the PBT: Roberts' performance in the field sobriety tests (albeit only somewhat poor); the apparent attempt to mask odors in the car; the strong odor of intoxicants coming directly from Roberts; his bloodshot eyes (albeit slight); and his admission of having consumed two whiskey drinks and a beer, most recently within the hour. These indicia of impairment are sufficient.

¶23 As noted above, Roberts contends that the circuit court failed to make an adequate record on this point. However, dismissal or remand is not necessary, because this court has found in the record, and identified here, support for the circuit court's decision. Although the standard requiring the proper exercise of discretion contemplates that circuit courts explain their reasoning, when a court does not do so, this court may search the record to determine if it supports the circuit court's discretionary decision. *See* ***State v. Pharr***, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983).

Approved Status of PBT Device

¶24 Roberts makes an argument that depends on the alleged interplay of WIS. STAT. §§ 343.305(9)(a)5. and 343.303. Roberts contends that the State has the burden of proving in all refusal hearings, as a "statutory element," that if a PBT was used to establish probable cause for arrest (§ 343.305(9)(a)5.), then pursuant to § 343.303, the PBT must have been one approved by DOT, and that

because there was no proof of any kind on the DOT approval issue, this refusal must be dismissed. However, Roberts failed to raise this issue during the evidentiary phase of this case, and fails now to provide legal authority to support his position that the State had a burden to prove this fact as an "element" of a refusal hearing. Therefore, Roberts has failed to identify a legal ground meriting reversal or remand.

¶25 WISCONSIN STAT. § 343.303 provides that an officer may make the request to take the breath sample "using a device approved by the department for" the purpose of conducting a PBT. However, at the refusal hearing, neither party presented evidence or posed any questions on this issue, and Roberts did not seek to reopen the evidentiary hearing to probe it. As a result, the record lacks evidence either way as to whether the PBT used by the trooper, himself an employee of DOT, was a device approved by his employer.

¶26 Roberts did not make this argument in advance of or during the evidentiary hearing. Instead, he made it for the first time in the course of one paragraph, not set off by a heading, within a twelve-page brief submitted to the circuit court following the evidentiary hearing. As on appeal now, this one paragraph argument contains no citation to case law authority supporting his position. Roberts also did not raise the issue at the October 6, 2010, hearing convened for the refusal decision, and therefore allowed the court to render its decision without reference to the "DOT approval" issue. Additionally, Roberts did not move the court to reopen the evidentiary hearing, to reconsider the refusal decision based on this issue, or to take any other action to address this issue.

¶27 The legislature has established that a circuit court is to make specific findings after taking evidence in a refusal case, and these do not include a finding

that, if the officer used a PBT it had to be one approved by DOT. As relevant here, pursuant to WIS. STAT. § 343.305(9)(a)5., the issues at a refusal hearing are limited to:

> (1) Whether the trooper had probable cause to believe that Roberts "was driving or operating a motor vehicle while under the influence of alcohol, ... or having a prohibited alcohol concentration," and whether Roberts "was lawfully placed under arrest for violation of s. 346.63(1)."
>
> (2) Whether the trooper complied with WIS. STAT. § 343.305(4), which requires officers to explain the nature of the request for a chemical test using prescribed language contained in the Informing the Accused form.
>
> (3) Whether Roberts refused to permit the test, other than for reasons of a physical disability not related to use of alcohol or controlled substances.

See ***State v. Nordness***, 128 Wis. 2d 15, 25-26, 381 N.W.2d 300 (1986) (issues at revocation hearing limited to those listed in prior and comparable version of WIS. STAT. § 343.305(9)(a)5.). There is nothing in the language of WIS. STAT. § 343.305(9)(a)5. reflecting legislative intent that the State's burden in proving the first of these three elements includes proof that, if an officer used a PBT, it must have been a DOT approved one. It is certainly not self-evident from the language of WIS. STAT. §§ 343.303 and 343.305(9)(a)5., when those provisions are read together, that the requirement that the court make a finding regarding probable cause for a lawful arrest includes a finding that, if a PBT result contributed to the

determination of probable cause, the State must have shown that the PBT was DOT approved.

¶28 To resolve this appeal, it is not necessary to determine what the permissible range of options might have been for the circuit court if either party had asked the trooper during the evidentiary portion of the refusal hearing whether the trooper had used a DOT-approved PBT and received a negative response.[11] In other words, there is no need to consider here the remedies that might be available in the refusal context if the evidence shows that an officer failed to use a DOT-approved PBT. In this appeal, Roberts forfeited objection on this issue at the evidentiary hearing stage, did not highlight it following the evidentiary hearing, and now argues that the State did not meet a burden, which Roberts asserts the State has in all refusal cases, to prove that the PBT used was DOT-approved. Roberts fails to demonstrate through the analysis of statutory language or case law that the State has such a burden, seemingly contrary to the plain language of WIS. STAT. § 343.305(9)(a)5.

¶29 It is not entirely clear from the briefs, but Roberts may argue on appeal that, because the trial court failed to address the DOT approval issue, the case should be remanded for fact finding on this issue. Even putting aside the question of whether he adequately preserved the DOT approval issue before the trial court, remand is not appropriate. As explained above, Roberts has failed to identify legal authority for the proposition that DOT approval is an element that

[11] This court also need not address the details of how DOT approval may be proven or challenged, beyond noting that this court has had occasion to observe that a listing of approved PBTs has been available through the Chemical Test Section of the Wisconsin State Patrol. *See* ***State v. Colstad***, 2003 WI App 25, ¶28 n.7, 260 Wis. 2d 406, 659 N.W.2d 394. These are not issues that the parties developed before the circuit court or now on appeal.

must be affirmatively shown by the State in all refusal hearings where a PBT was used.

Unreasonable Refusal

¶30 Roberts contends that the trial court erred in concluding that Roberts unreasonably refused to submit to the requested breath test. More specifically, Roberts asks this court to conclude that what Roberts testified to about his communications with the trooper regarding the refusal "rings truer" than what the trooper testified to. However, deciding what "rings truer" is the obligation of the circuit courts, not the appellate courts, absent a finding not requested here by Roberts, namely, that a circuit court determination is "'inherently or patently incredible,'" or "'in conflict with the uniform course of nature or with fully established or conceded facts.'" ***Chapman v. State***, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975) (citations omitted).

¶31 Roberts contends that the circuit court failed to make findings to support its decision regarding the refusal, but again this court is able to review the record to determine whether there is support for its decision. *See* ***Pharr***, 115 Wis. 2d at 343. The trooper's testimony, which clearly establishes a refusal, was itself not "inherently or patently incredible," or "in conflict with the uniform course of nature or with fully established or conceded facts," and therefore the circuit court was entitled to rely on that testimony to resolve this issue.

CONCLUSION

¶32 For the reasons stated above, the judgment is affirmed.

By the Court.—Judgment affirmed.

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