COURT OF APPEALS
DECISION
DATED AND RELEASED

July 27, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-3383-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARK D. GARLOCK,

Defendant-Appellant.

APPEAL from an order of the circuit court for Monroe County: MICHAEL J. MCALPINE, Judge. *Affirmed*.

VERGERONT, J.[1] Mark D. Garlock appeals from an order revoking his operating privileges for two years on the ground that he unreasonably refused to submit to chemical testing under § 343.305, STATS. Garlock contends that there was no probable cause to arrest him for operating a motor vehicle while intoxicated (OMVWI) and that he did not refuse to submit to a blood test. We reject both arguments and affirm.

[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

Garlock was involved in a motor vehicle accident when a pickup truck he was in went off the road. When Officer Rusty William Fritz arrived at the accident scene, Garlock and one other person who had been in the truck were there. Garlock denied that he was driving and said that a third person, who had just run off, was driving. Garlock was taken to the hospital for treatment of his injuries.

At the hospital, Officer Fritz told Garlock he was under arrest for OMVWI, and another officer issued him a citation for OMVWI. Officer Fritz read Garlock the "Informing the Accused" form and asked him if he would submit to an evidentiary chemical test of his blood. Garlock answered "no." Officer Fritz then told Garlock that since it was a crime, he was going to take the blood sample anyway. A nurse came in and drew the blood. Officer Fritz filled out and issued a notice of intent to revoke operating privileges that alleged that Garlock had refused to submit to a blood test.

Section 343.305, STATS., provides that any person who drives or operates a motor vehicle upon the public highways of this state is deemed to have given consent to chemical testing when requested to do so by a law enforcement officer. Section 343.305(2). A law enforcement officer may request a person to submit to testing upon arrest for operating a motor vehicle while under the influence of an intoxicant. Section 343.305(3)(a). The officer must inform the arrestee of the arrestee's implied consent to a test; that if the arrestee refuses the test, his or her license shall be revoked; and that the arrestee may have an additional test performed. Section 343.305(4). If testing is refused, the officer issues a notice of intent to revoke the person's operating privileges, and operating privileges are revoked unless a hearing is requested. Section 343.305(9) and (10).

Garlock requested a hearing pursuant to § 343.305(9), STATS., to challenge the proposed revocation. The trial court determined after the hearing that Garlock's operating privileges should be revoked for two years because all of the issues addressed at the hearing under § 343.305(9)(a)5 were determined adversely to him.

Garlock contends that the police officers did not have probable cause to believe he was driving the truck while intoxicated at the time of the

accident. Before Garlock's operating privileges can be revoked for refusing to submit to a blood test, there must be probable cause to believe that he was driving while under the influence of alcohol. Section 343.305(9)(a)5.a, STATS.

In ***State v. Nordness***, 128 Wis.2d 15, 381 N.W.2d 300 (1986), the supreme court stated:

> [T]he revocation hearing [is] a determination merely of an officer's probable cause, not ... a forum to weigh the state's and the defendant's evidence. Because the implied consent statute limits the revocation hearing to a determination of probable cause--as opposed to a determination of probable cause to a reasonable certainty--we do not allow the trial court to weigh the evidence between the parties. The trial court, in terms of the probable cause inquiry, simply must ascertain the plausibility of a police officer's account.

Id. at 36, 381 N.W.2d at 308.

We conclude that based on the facts available to Officer Fritz at the time of the arrest, a reasonable officer would believe that Garlock was driving the vehicle under the influence of an intoxicant. First, there was probable cause to believe that Garlock was driving the vehicle at the time of the accident. Both Officer Fritz and Officer Scott Lindemann investigated the area and saw no evidence that a third person had run through the tall grass on the hill, as Garlock insisted. Officer Fritz learned that Garlock was the owner of the truck, which was new. In response to a question about why Garlock would let someone else drive his new truck, Garlock provided no explanation. Garlock's description of the person who was driving the truck was vague. And Garlock's injuries matched the damage to the interior of the driver's side of the truck.[2]

[2] A witness to the accident testified that Garlock was driving. However, it is not clear from the record whether the witness told the officers this prior to Garlock's arrest. Therefore we do not consider this testimony in deciding whether there was probable cause.

There was also probable cause to believe that Garlock was intoxicated at the time of the accident. Officers Fritz and Lindemann testified that Garlock's speech was slurred, his eyes were glassy and he had difficulty walking. Both officers were certain that they detected a strong odor of intoxicants on Garlock's breath.[3]

Garlock's second argument is that he did not refuse to take the blood test because he submitted to the test after orally refusing to take the test. He claims that his obligation under § 343.305, STATS., is to submit to the test, not to answer affirmatively when asked to submit to the test.

The interpretation and application of § 343.305, STATS., to a set of facts presents a question of law that we review independently of the trial court's determination. *See* ***State v. Wilke***, 152 Wis.2d 243, 247, 448 N.W.2d 13, 14 (Ct. App. 1989).

Section 343.305, STATS., does not limit the right to take a blood sample as a search incident to a lawful arrest. ***Scales v. State***, 64 Wis.2d 485, 494, 219 N.W.2d 286, 292 (1974). A blood sample may be drawn incident to an arrest if there is a reasonable suspicion that the blood contains evidence of a crime. ***State v. Seibel***, 163 Wis.2d 164, 179, 471 N.W.2d 226, 233, *cert. denied*, 502 U.S. 986 (1991). Reasonable suspicion requires a lesser showing than probable cause. *See* ***State v. Swanson***, 164 Wis.2d 437, 453 n.6, 475 N.W.2d 148, 155 (1991). Officer Fritz was correct when he told Garlock that even if he refused to submit to the test, his blood could be drawn anyway because he had been arrested for driving while intoxicated.

In Garlock's view, a refusal to submit to the test is not really a refusal if one does not resist the test after being informed that it can be performed without consent. We decline to adopt this interpretation of § 343.305, STATS. The purpose of the statute is to facilitate the taking of the test. ***Scales***, 64 Wis.2d at 494, 219 N.W.2d at 292. If all statutory requirements are met, drivers who refuse are to be penalized by having their operating privileges revoked. Garlock was properly informed of the consequences of refusing, as required by statute, and he said "no."

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[3] The officers did not perform a field sobriety test because of Garlock's injuries.

In most, if not all, instances when there is probable cause to arrest for driving while intoxicated, there is also a reasonable suspicion to draw blood. Therefore, in most, if not all, instances when an officer may request that a person upon arrest submit to a test under § 343.305, STATS., the officer could also take the test without the person's consent. If submitting to a test after a refusal cancels out the refusal, there will be few instances when a penalty can be imposed under § 343.305. We conclude this is an unreasonable interpretation of the statute. We affirm the trial court's determination that Garlock refused to submit to the test.

By the Court.—Order affirmed.

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