COURT OF APPEALS
DECISION
DATED AND RELEASED

April 25, 1996

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. 95-2633-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

EUGENE M. BRABENDER,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Dane County: MARK A. FRANKEL, Judge. *Affirmed*.

VERGERONT, J.[1] Eugene Brabender appeals from a judgment of conviction for operating a motor vehicle with a prohibited blood alcohol concentration, in violation of § 346.63(1)(b), STATS. He contends that the trial court erred in denying his motion to suppress the results of a blood test because there was no probable cause to arrest him and because the arresting officer did not provide him with the statutorily-required information before the blood test was administered. We reject each of these arguments and affirm.

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

BACKGROUND

Officer Douglas Blaeske of the Mazomanie Police Department testified at the bench trial. He responded to a call concerning a deer/car collision which occurred on Highway 14 in Dane County. On his arrival he saw two vehicles, a Cadillac and a pick-up truck, and two males. The driver of the truck, Norman Meland, had struck the deer. Brabender had driven to the scene in the Cadillac to help Meland, his stepson, with the deer.

While Blaeske was obtaining information from Meland, he observed Brabender swaying slightly, while smoking a cigarette. Blaeske smelled an odor of intoxicants coming from Brabender. In response to Blaeske's question, Brabender said that he would take the deer. Since Blaeske needed Brabender's license to issue a deer tag, he asked Brabender for his driver's license. Brabender leaned against one of the vehicles as he removed his wallet and looked in it. Blaeske shined his flashlight on Brabender's wallet and could see the license in the centerfold of the wallet right away. Brabender, however, first removed papers from the side fold and put them back before he took his license from the centerfold.

After Blaeske completed the deer tag, he attempted to hand it to Brabender, but the tag fell to the ground. Brabender reached for the permit, but Blaeske is not sure if Brabender touched it before it fell. Brabender did not pick up the permit; Meland picked it up for him. While Meland did this, Brabender was leaning against one of the vehicles.

Blaeske asked Brabender if he would be willing to perform field sobriety tests. Brabender became very angry, said he was being harassed by the Cross Plains, Black Earth and Mazomanie Police Departments and refused to take the tests. In response to Blaeske's questioning, Brabender swore that he had had only three beers that evening.

Blaeske's training includes recognizing the signs of persons under the influence of an intoxicant. He believed Brabender was operating under the influence because Brabender swore he had had only three beers; was swaying back and forth; smelled of intoxicants; could not find his license although

Blaeske could clearly see it; was leaning on one of the vehicles; and refused to do the field sobriety tests. According to Blaeske, most people are cooperative and willing to do field sobriety tests if they are not under the influence. Also, Brabender was smoking cigarettes the entire twenty to twenty-five minutes at the scene and Blaeske thought Brabender might be trying to cover up his breath. After forming the opinion that Brabender was operating under the influence, Blaeske arrested him. Blaeske then provided Brabender with an "Informing the Accused" form before a blood test was administered. The form was outdated. The State stipulated to the form that should have been used.

The trial court determined that there was probable cause to arrest Brabender for operating a motor vehicle under the influence of an intoxicant. With respect to the "Informing the Accused" form given to Brabender, the court concluded that the Mazomanie Police Department failed to comply with the informed consent statute, § 343.305, STATS.[2] However, it denied Brabender's motion to suppress the blood test results, concluding that the proper remedy for the statutory violation was that the test results would not automatically be admissible, as they would be if there had been compliance with the statute.

PROBABLE CAUSE

Brabender argues that given the undisputed facts, no reasonable police officer would believe that he was operating a motor vehicle while under the influence of an intoxicant. We disagree and conclude that the trial court correctly found that there was probable cause.

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[2] Any person operating a motor vehicle is deemed to have given consent to one or more tests of his or her breath, blood or urine for the purpose of determining the presence or quantity in his or her breath or blood of alcohol or controlled substances when requested by a law enforcement officer. Section 343.305(2), STATS. The manner of request, the nature of the tests, including alternative tests, and the information that must be given the accused are prescribed in § 343.305(3), (4), (5) and (6). If the person submits to the tests in accordance with the statute and the results indicate a prohibited alcohol concentration, the person's license is suspended, subject to administrative review. Section 343.305(7)(a) and (8). A refusal to take the test described by statute may result in license revocation. Section 343.305(9) and (10).

Whether undisputed facts constitute probable cause is a question of law that we review de novo. ***State v. Babbitt***, 188 Wis.2d 349, 356, 525 N.W.2d 102, 104 (Ct. App. 1994). In determining whether probable cause exists, we look to the totality of the circumstances. ***Id.*** The inquiry is whether the arresting officer's knowledge at the time of arrest would lead a reasonable police officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant. ***Id.*** The test is one of probabilities, meaning that the facts and circumstances within the officer's knowledge need only be sufficient to lead a reasonable officer to believe that guilt is more than a possibility. ***Dane County v. Sharpee***, 154 Wis.2d 515, 518, 453 N.W.2d 508, 510 (Ct. App. 1990).

A defendant's refusal to submit to field sobriety tests may be used as evidence of probable cause to arrest. ***Babbitt***, 188 Wis.2d at 363, 525 N.W.2d at 107. Brabender's refusal to submit to the tests, his hostile response to that request, the odor of alcohol in an outdoor environment despite constant smoking, his admission that he had had three beers, his swaying and leaning against one of the vehicles, his inability to find his driver's license when the officer readily saw it, and the fact that Brabender did not pick up the deer tag when it fell after Blaeske attempted to hand it to him are sufficient, taken together, to establish probable cause.

Brabender offers alternative explanations for certain of Brabender's behavior and actions. But the existence of plausible innocent explanations does not mean that it is unreasonable, based on the totality of the circumstances, to believe that guilt is more than a mere possibility. Brabender also points to behaviors he did not exhibit. He notes, for example, that Blaeske testified that he did not stumble and that Blaeske could not remember whether he had bloodshot or glassy eyes. But there are no required facts for a determination that probable cause exists to believe that a person is driving while under the influence of an intoxicant. The totality of circumstances in this case are sufficient to support that determination.

IMPLIED CONSENT LAW

Brabender argues that the "Informing the Accused" form that Blaeske provided him violated the implied consent statute and, therefore, the

blood test results should have been suppressed. He cites these three deficiencies in the form: (1) it states that the prohibited blood alcohol concentration is .10, but, since Brabender was being charged with a third offense, the standard is .08; (2) although the form advised that, after submitting to the test at the request of a law enforcement officer, the accused may request the alternative test that the law enforcement agency is prepared to administer, it did not advise that the alternative test would be at the agency's expense; and (3) it did not advise that if the accused has three offenses within a ten-year period after January 1, 1988, a motor vehicle owned by the accused may be equipped with an ignition interlock device, immobilized, or seized and forfeited.

The State implicitly concedes that the form provided to Brabender violated the statute, but responds that Brabender is not entitled to suppression of the test results.[3] Because of the State's concession, we assume the form violated the statute on the three points and consider only whether Brabender is entitled to suppression of the blood test results as a result of those violations. We conclude he is not.

We consider ***State v. Zielke***, 137 Wis.2d 39, 403 N.W.2d 427 (1987), to be dispositive. Zielke was arrested for driving under the influence of an intoxicant. A blood sample was taken for a blood test, but the officer did not advise Zielke of his right to an alternative test as required by the predecessor to § 343.305(4)(d), STATS.[4] Although the seizure of the blood was constitutional, the trial court and court of appeals suppressed the test results because the

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[3] The State in its brief states that "[i]t is undisputed that Officer Blaeske read an outdated Informing the Accused Form to Brabender," and does not dispute that the outdated form violated the implied consent statute in the three ways Brabender describes.

[4] Section 343.305(2), STATS., requires law enforcement to provide at its expense at least two of three approved tests to determine the presence of alcohol in the breath, blood or urine of a suspected intoxicated driver. ***State v. Stary***, 187 Wis.2d 266, 269, 522 N.W.2d 32, 34 (Ct. App. 1994). Law enforcement may designate one of those two as its primary test. ***Id.*** Once a person consents to the primary test, the person is permitted, at his or her request, the alternate test the agency chooses, at the agency's expense, or a reasonable opportunity to a test of the person's choice at the person's expense. ***Id.*** at 270, 522 N.W.2d at 34.

statutory procedure was not followed. The supreme court reversed. It concluded:

> However, even though failure to advise the defendant as provided by the implied consent law affects the State's position in a civil refusal proceeding and results in the loss of certain evidentiary benefits, e.g., automatic admissibility of results and use of the fact of refusal, nothing in the statute or its history permits the conclusion that failure to comply with sec. 343.305(3)(a), STATS. [the predecessor to § 343.305(4)], prevents the admissibility of legally obtained chemical test evidence in the separate and distinct criminal prosecution for offenses involving intoxicated use of a vehicle.

Id. at 51, 403 N.W.2d at 432. *See also* ***City of Waupaca v. Javorski***, 198 Wis.2d 563, 574-75, 543 N.W.2d 507, 511-12 (Ct. App. 1995) (failure to properly advise of the possible benefits of a second test, as required by statute, does not warrant suppression of first test).

Brabender argues that ***State v. McCrossen***, 129 Wis.2d 277, 385 N.W.2d 161, *cert. denied*, 479 U.S. 841 (1986), not ***Zielke***, controls this case. Following her arrest, McCrossen was given a breath test. She then requested a second test, either a blood or urine test. When she was informed that she would have to pay for such a test, she agreed. She was not told that there was an alternative test that the department was prepared to administer at its expense, nor that she could be released to get a second test at her own expense, both statutory requirements. The police never administered the requested second test. The supreme court approved the trial court's suppression of the blood test results as a sanction for violating McCrossen's statutory rights to an alternative test. ***McCrossen***, 129 Wis.2d at 297, 385 N.W.2d at 170. However, it held that due process did not require dismissal of the charge. ***Id.*** at 296-97, 385 N.W.2d at 169-70.

The ***Zielke*** court acknowledged ***McCrossen*** and stated that, on the facts of ***McCrossen***, suppression of the test results was an appropriate, although

not a required, remedy. ***Zielke***, 137 Wis.2d at 55-56, 403 N.W.2d at 434. The ***Zielke*** court concluded that the facts before it did not support the act of the trial court's discretion in suppressing the test results. ***Id.*** The facts supporting suppression of the test results in ***McCrossen***, according to the ***Zielke*** court, were that the defendant requested an alternative test and was willing to pay for it; that the department did not administer an alternative test in spite of the request; and that the department did not release her so that she could obtain a second test on her own. ***Zielke***, 137 Wis.2d at 55-56, 403 N.W.2d at 434. The remedy of the sanction of suppression of the first test in such circumstances is required neither by statute, ***id.***, nor the constitution, ***McCrossen***, 129 Wis.2d at 297, 385 N.W.2d at 170. It is based on the reasoning that the department's failure to provide an alternative test when requested, as required by statute, is analogous to the failure to make available statutorily-mandated evidence, which interferes with the accused's right to discover material evidence to which he or she is entitled. ***McCrossen***, 129 Wis.2d at 297, 385 N.W.2d at 170; ***State v. Renard***, 123 Wis.2d 458, 461, 367 N.W.2d 237, 238-39 (Ct. App. 1985).

Brabender was informed that he could request an alternative test that the agency was prepared to administer. He did not request an alternative test or ask any questions about the alternative test. Failure to inform him that the alternative test would be at the department's expense is not the type of failure to make available statutorily-mandated evidence that made suppression of the first test appropriate in ***McCrossen***. The other two deficiencies in the form provided Brabender have nothing to do with his statutory right to an alternative test.

Brabender also argues that the violation of the implied consent law in this situation violated due process. There is no merit to this contention. The right to a second test, when a reliable first test is performed, is not required by due process. ***McCrossen***, 129 Wis.2d at 297, 385 N.W.2d at 170. Brabender relies on ***State v. Sutton***, 177 Wis.2d 709, 503 N.W.2d 326 (Ct. App. 1993), but that case does not support this argument. ***Sutton*** concerned a challenge to the revocation of operating privileges following an administrative hearing provided for in § 343.305(9) and (10), STATS., for refusal to take the test requested by the officer. Sutton claimed the revocation was invalid because the officer had failed to substantially comply with § 343.305(4) in that he inaccurately stated the potential penalties for refusal. We held that there was substantial compliance because the officer had overstated, rather than understated, the penalty and

Sutton was not prejudiced. ***Sutton***, 177 Wis.2d at 715, 503 N.W.2d at 328. ***Sutton*** has no bearing on Brabender's due process argument.

Brabender's argument that his license may not be revoked because of the statutory violations is also without merit. The cases he relies on concern the administrative revocation process under the implied consent statute for refusal to take the test requested by the officer. *See, e.g.,* ***State v. Wilke***, 152 Wis.2d 243, 448 N.W.2d 13 (Ct. App. 1989). Whether or not the statutory violations in the form provided to Brabender would prevent revocation of his license in an administrative proceeding under § 343.305(10), STATS., they do not prevent revocation upon a conviction under § 346.63(1)(b), STATS.

By the Court.—Judgment affirmed.

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