COURT OF APPEALS
DECISION
DATED AND RELEASED

June 20, 1996

NOTICE

No. 95-2650

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RENEE A. FREDEL,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Dane County: ROBERT DECHAMBEAU, Judge. *Affirmed*.

VERGERONT, J.[1] Renee Fredel appeals from a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant and with a prohibited blood alcohol concentration, contrary to § 346.63(1)(a) and (b), STATS. She contends that there was no probable cause to arrest her and that her right to due process was violated because she did not timely receive certain information about the benefits of having a second

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

chemical test performed as required by the implied consent law, § 343.305, STATS. We reject both contentions and affirm.

At the hearing on Fredel's motion to suppress the fruits of an unlawful arrest, Officer Robert Hale, Fredel, a chemist at the State Laboratory of Hygiene and a witness to the incident testified. Hale testified that on August 22, 1993, at approximately 12:50 a.m., he was in a University of Wisconsin Police Department squad car when he observed Fredel driving her car with two males sitting on the trunk. Once the two males saw Hale following them, they jumped off the car and fled. Hale activated his emergency lights and stopped Fredel. Fredel identified herself and showed a valid driver's license. Hale noticed an odor of alcohol coming from Fredel. He asked Fredel if she had been drinking and Fredel responded that she had had a couple of beers at a party. Hale asked her to take five field sobriety tests and she did. After the tests, Hale placed Fredel under arrest for operating a motor vehicle while intoxicated. He took Fredel to the University of Wisconsin Hospital where she consented to a chemical test of her blood. The result of the test showed a blood alcohol concentration of .148%.

Fredel's probable cause challenge centers on her contention that her performance on the field sobriety tests did not indicate intoxication and that the other evidence presented was insufficient to establish probable cause.

In reviewing the denial of a suppression motion, we uphold the trial court's findings of fact unless they are clearly erroneous. *See* ***State v. Jackson***, 147 Wis.2d 824, 829, 434 N.W.2d 386, 388 (1989). Whether the facts as found by the trial court constitute probable cause is a question of law, which we review de novo. ***Village of Elkhart Lake v. Borzyskowski***, 123 Wis.2d 185, 189, 366 N.W.2d 506, 508 (Ct. App. 1985). In ***State v. Riddle***, 192 Wis.2d 470, 531 N.W.2d 408 (Ct. App. 1995), we stated:

> Probable cause exists where the totality of the circumstances within the arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a crime.

> While the circumstances within the arresting officer's knowledge need not be sufficient to make the defendant's guilt more probable than not, the defendant's guilt must be more than a mere possibility for the arrest to be constitutional. Further, in determining whether probable cause existed, we do not look to the officer's subjective beliefs, but apply an objective standard based upon the circumstances as they were at the time of the arrest.

Id. at 476, 531 N.W.2d at 410 (citation omitted; quotation omitted).

In ***State v. Babbitt***, 188 Wis.2d 349, 525 N.W.2d 102 (Ct. App. 1994), we stated:

> Probable cause does not require "proof beyond a reasonable doubt or even that guilt is more likely than not."

Id. at 357, 525 N.W.2d at 104 (citation omitted).

Before administering the field sobriety tests, Hale made these observations. He noticed that Fredel's eyes were slightly glassy, although he did not recall if they were red or not. Besides the odor of alcohol coming from the vehicle, he noticed an odor of alcohol coming from Fredel's breath. Fredel admitted to having had "a couple of beers" at a party. She had been driving with two men sitting on the trunk of her vehicle. Since they were blocking the rear window of her vehicle, it was reasonable to infer that Fredel knew or should have known they were there. It was also reasonable to infer, as the trial court did, that driving with two people sitting on the trunk of the vehicle shows impaired judgment on the part of the driver.

With respect to the field sobriety tests, the court found that Fredel was unable to stand still during four of the five tests; she swayed back and forth to maintain her balance. The court found that Fredel could not complete the one-legged stand test; instead of lifting her leg six inches off the ground for thirty seconds, as directed, she could only do so for twenty-four seconds. The court found that her performance on these two tests indicated a lack of coordination. The court also found that Fredel was confused by Hale's directions on more than one occasion. The court found, as one example of confusion, that Fredel touched the middle of her nose with the tip of her finger rather than touching the tip of her nose with the middle of her finger.

We reject Fredel's argument that because Hale did not testify regarding what constituted "passing" and "failing" each of the tests, his observations about her performance of the tests may not be considered by the trial court. Hale testified that he had three years of experience as a military police officer and approximately eight months of experience with the University of Wisconsin Police Department. He had been instructed in conducting field sobriety tests by a Wisconsin state trooper at a police training session in Waukesha. He also received some training in these tests through the military police and from his field training officers at the University of Wisconsin Police Department. Hale testified that while most officers use three field sobriety tests, he uses five. He has also had the opportunity to compare the results of his field sobriety testing with the chemical test results on the same subjects.

Hale testified that he uses the five tests to evaluate four overall factors: ability to understand the instructions, balance, attitude and cooperation. Hale made it clear that Fredel's attitude and cooperation were good. However, he testified that Fredel seemed confused by the test instructions; he had to repeatedly ask if she had questions or if she understood him. Hale rated Fredel's balance as poor, describing her swaying and other movements that indicated a lack of balance during the pertinent tests. Fredel did successfully complete the alphabet test.

Hale's testimony established a sufficient foundation for his observations that Fredel had poor balance and was confused by his instructions while performing the tests. The trial court could properly rely on these observations in making its findings regarding Fredel's performance on the field sobriety tests.

Fredel argues that there are other plausible explanations for her swaying and apparent confusion besides being under the influence of an intoxicant. She also argues that there are inferences other than that of impaired judgment to be drawn from the fact that two males were sitting on the trunk of her car. Even if this is true, when faced with competing reasonable inferences, an officer may rely on the one that justifies an arrest. *See* ***State v. Tompkins***, 144 Wis.2d 116, 125, 423 N.W.2d 823, 827 (1988).

We conclude the trial court's findings are based on the record and are not clearly erroneous. Based on those findings and the undisputed facts, we conclude that there was probable cause to believe Fredel was driving while under the influence of an intoxicant.

Fredel also contends that her right to due process was violated because she was not timely informed of the benefits of taking a second chemical test. This lack of timely notice discouraged her from taking a second test which, Fredel contends, is not just a statutory right under the implied consent law, § 343.305, STATS., but is also a constitutional right.

Before the blood test was administered, Hale read Fredel the standard Informing The Accused form, which states in pertinent part that the accused may request an alternative test that the law enforcement agency is prepared to administer at its expense or may request a reasonable opportunity to have a qualified person of the accused's choice administer a chemical test at the accused's expense. This form also states that if the accused takes one or more tests and "the result of *any* test" (emphasis added) indicates the accused has a prohibited alcohol concentration, operating privileges will be administratively suspended in addition to other penalties which may be imposed.

Fredel did not ask for an alternative test. The blood sample taken from her on the morning of August 22 was not tested until the following day. The results were reported on August 24. The arresting officer mailed the Notice of Intent to Suspend Operating Privilege to Fredel on August 27. This notice advises of the right to an administrative hearing to contest the suspension and of the issues at the hearing--one of which is whether "*each* of the test results

indicates the person had a prohibited alcohol concentration." (Emphasis added.)

Fredel's argument is that until she received the Notice of Intent to Suspend Operating Privilege, she was not informed that a contradictory result on a second test could aid her in seeking recision of the suspension based on the first test. When she received the notice, it was too late to take a second test.

In ***City of Waupaca v. Javorski***, 198 Wis.2d 563, 543 N.W.2d 507 (Ct. App. 1995), we considered the same argument on substantially similar facts. We held that there was no violation of the right to due process and that Javorski was not entitled to suppression of the results of his blood test. Apparently recognizing that ***Javorski*** is dispositive on this issue, Fredel does not request suppression of her blood test results, but asks instead for a new trial at which the favorable statutory presumptions regarding the admissibility of blood test results do not apply.[2] Fredel cites ***State v. Zielke***, 137 Wis.2d 39, 403 N.W.2d 427 (1987), and ***County of Eau Claire v. Resler***, 151 Wis.2d 645, 446 N.W.2d 72 (Ct. App. 1989), in support of this argument.

The court in ***Zielke*** held that failure to comply with the procedures of the implied consent law did not render chemical tests inadmissible if they were otherwise constitutionally obtained. ***Zielke***, 137 Wis.2d at 41, 403 N.W.2d

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[2] Section 343.305(5)(d), STATS., provides in part:

> At the trial of any civil or criminal proceeding arising out of the acts committed by a person alleged to have been driving or operating a motor vehicle while under the influence of an intoxicant ... the results of a test administered in accordance with this section are admissible on the issue of whether the person was under the influence of an intoxicant ... or any issue relating to the person's alcohol concentration. Test results shall be given the effect required under s. 885.235.

Section 885.235(1), STATS., gives certain evidentiary effect to the chemical analysis of samples taken within three hours of the event without the necessity for expert testimony. Because it is unnecessary to the disposition of this appeal, we do not decide whether the blood test would have been admissible had §§ 343.305(5)(d) and 885.235, STATS., not applied.

at 428. The issue was whether the first chemical test could be taken incident to an arrest without complying with any of the statutory procedures, such as reading the Informing The Accused form. ***Id.*** at 43-44, 403 N.W.2d at 428-29. In suggesting that there were still incentives for law enforcement officials to comply with the statutorily-implied consent law procedures, the court stated:

> As previously explained, when law enforcement officers fail to comply with the implied consent statute the driver's license cannot be revoked for refusing to submit to chemical tests. Furthermore, if the procedures of sec. 343.305, STATS., are not followed the State cannot rely on the favorable statutory presumptions concerning the admissibility of chemical-test results set forth in sec. 343.305(7). In addition, the fact of refusal cannot be used in a subsequent criminal prosecution for drunk driving as evidence of the driver's consciousness of guilt.

Zielke, 137 Wis.2d at 54, 403 N.W.2d at 433.

In ***Resler***, we repeated these consequences for failing to follow statutory procedures, relying on ***Zielke***. ***Resler***, 151 Wis.2d at 652, 446 N.W.2d at 74. Resler argued that because she was not informed of the penalties resulting from a conviction for driving with a prohibited blood alcohol concentration as required by § 343.305(4), STATS., the breath test she consented to should have been suppressed. We rejected that argument, but did not address or decide whether any other remedy was appropriate.

Neither ***Zielke*** nor ***Resler*** concerned a second test. Neither supports the proposition that because of the timing of certain information given about the alternative test, the results of the first test should be suppressed. Fredel does not point to any statutory procedure that was not complied with concerning the blood test. She does not argue that the potential advantage of a second test should have been made known to her *before* she took the blood test and we can see no reason why her consent to that first test would have depended on having information about the potential benefits of a second test. We conclude that the timing of the Notice of Intent to Suspend Operating Privilege does not result in the loss of favorable statutory presumptions or

evidentiary effect as to the blood test. The trial court did not err in denying Fredel's motion to exclude the test results.

By the Court.—Judgment affirmed.

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