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DISTRICT III

August 6, 2024

To:

Hon. Steven P. Anderson
Reserve Judge

Thomas J. Coaty
Electronic Notice

Lori Gorsegner
Clerk of Circuit Court
Rusk County Courthouse
Electronic Notice

Robert Paul Maxey
Electronic Notice

Steven L. Miller
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

2022AP939

State of Wisconsin v. Joshua M. Foulk
(L. C. Nos. 2020TR432, 2020TR482)

Before Stark, P.J.¹

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Joshua M. Foulk appeals from a circuit court order determining that his refusal to submit to a chemical evidentiary test of his breath or blood was unreasonable. This order resulted in a judgment imposing penalties, including the revocation of Foulk's operating privileges and the requirement that he install an ignition interlock device in his motor vehicle. Based upon our

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2021-22). All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

review of Foulk’s brief and the record, we conclude that this case is appropriate for summary disposition, and we summarily affirm.² *See* WIS. STAT. RULE 809.21. .

Foulk was stopped by Rusk County Sheriff’s Department Deputy Tyler Branstad upon suspicion him operating a motor vehicle while intoxicated (OWI). Foulk argues that due to Branstad’s improper administration of field sobriety tests (FSTs), Branstad did not have probable cause to ask Foulk to take a preliminary breath test (PBT) and, following his refusal to do so, arrest Foulk for OWI. Specifically, Foulk argues that Branstad’s misadministration of the horizontal gaze nystagmus (HGN) test invalidates the results of that test and that, due to his passing performance on two other FSTs, Branstad lacked probable cause to ask Foulk to take a PBT. Foulk therefore contends that his refusal to submit to a test of his breath or blood was reasonable, and the circuit court erred by concluding otherwise.

We conclude that we need not address the issue of whether the circuit court erred in considering and relying upon the results of the HGN test in determining whether there was probable cause for Branstad to ask Foulk to take a PBT. *See Vanstone v. Town of Delafield*, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995) (stating that this court “may affirm on grounds different than those relied on” by the circuit court). Regardless of whether the court erred in that regard, Branstad nevertheless had probable cause to arrest Foulk given his signs of intoxication coupled with Foulk’s admissions regarding his consumption of alcohol. The court

² The State failed to file its respondent’s brief or to request an extension. This court sua sponte granted the State an extension of time to file its brief, and the State again failed to file a brief or to request an additional extension. We pause to note that, due to the State’s failures, we could impose penalties, including summary reversal. *See* WIS. STAT. RULE 809.83(2). We will, nevertheless, decide this case on the merits.

therefore did not err by finding Foulk's refusal to submit to chemical testing of his breath or blood unreasonable.

At a refusal hearing, a defendant may challenge whether he or she was lawfully placed under arrest. WIS. STAT. § 343.305(9)(a)5. As part of this inquiry, and as relevant here, the circuit court may entertain an argument that the arrest was unlawful because the officer did not have probable cause to believe that the defendant was operating under the influence of an intoxicant. Probable cause to arrest for OWI "refers to that quantum of evidence within the arresting officer's knowledge at the time of arrest that would lead a reasonable law enforcement officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant." *State v. Lange*, 2009 WI 49, ¶19, 317 Wis. 2d 383, 766 N.W.2d 551. When the facts are undisputed, whether there was probable cause to arrest is a question of law that we review independently. *Id.*, ¶20. "In determining whether there is probable cause, the court applies an objective standard, considering the information available to the officer and the officer's training and experience." *Id.*

The undisputed facts show that Branstad observed several indicia of intoxication before asking Foulk to take a PBT and his subsequent arrest. Branstad initiated a traffic stop after observing Foulk's vehicle traveling south in a northbound traffic lane and then crossing the centerline after it had returned to the proper lane of travel. Upon contacting Foulk after initiating a traffic stop, Branstad detected the odor of alcohol and marijuana coming from Foulk's vehicle, he observed that Foulk's eyes were bloodshot and his speech was slurred, and he saw an open container of alcohol in the center console of Foulk's vehicle. Foulk admitted that he had drunk "a couple beers" and then volunteered that he "shouldn't be driving." Branstad then asked Foulk

if he “was okay to drive,” and Foulk again indicated that he was not, stating, “I can honestly tell you no.”

Under the totality of these circumstances, we conclude that Branstad had probable cause to arrest Foulk after he refused to submit to a PBT. *See Village of Little Chute v. Bunnell*, No. 2012AP1266, unpublished slip op. ¶20 (WI App Nov. 14, 2012) (concluding that there was probable cause to arrest the defendant due to the police officer’s observations of the defendant’s dangerous driving, glassy eyes, and odor of intoxicants; the defendant’s admission that he had been drinking; and the defendant’s refusal to participate in some FSTs).³ In fact, Foulk admits as much in his brief, stating, “There is also little doubt[] that once Foulk refused to submit to a PBT, there was likely probable cause to arrest.” Accordingly, the circuit court did not err by concluding that Foulk’s refusal to submit to a chemical evidentiary test of his breath or blood was unreasonable, thereby resulting in the imposition of the statutory penalties required as a result of his refusal.

Upon the foregoing,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals

³ Unpublished opinions authored by a single judge and issued on or after July 1, 2009, may be cited for their persuasive value. *See* WIS. STAT. RULE 809.23(3)(b).

