COURT OF APPEALS
DECISION
DATED AND FILED

May 8, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP3163 **Cir. Ct. No. 2006TR1848**

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

IN THE MATTER OF THE REFUSAL OF ERIC D. SMITH:

WASHBURN COUNTY,

PLAINTIFF-RESPONDENT,

V.

ERIC D. SMITH,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Washburn County: EUGENE D. HARRINGTON, Judge. *Affirmed.*

¶1 CANE, C.J.[1] Eric Smith appeals an order determining there was probable cause to arrest him for operating while intoxicated and finding his refusal

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

to submit to chemical testing unreasonable. He contends the trial court incorrectly determined that the officer had probable cause to arrest him. Additionally, Smith argues the officer violated Wisconsin's implied consent law by providing misleading information regarding the consequences Smith would face as a Louisiana resident. We disagree and affirm the order.

BACKGROUND

¶2 On July 23, 2006, at approximately 2:40 a.m., deputy Shawn Sutherland observed a vehicle traveling at seventy-six miles per hour in a fifty-five-mile-per-hour zone. Sutherland activated his emergency lights and pursued the vehicle operated by Smith. As he pursued Smith, Sutherland observed him cross the centerline twice. Sutherland reported that Smith continued to travel down the highway for approximately three tenths of a mile after he activated his lights. After Smith pulled over, Sutherland approached him and detected an odor of intoxicants. Smith initially admitted drinking a couple of beers. Later in the conversation, Smith told Sutherland he would be lying if he said he just had a couple of beers. Sutherland placed Smith under arrest for operating while intoxicated.

¶3 Sutherland read Smith the Informing the Accused form verbatim and asked Smith to submit to an evidentiary breath test. Smith expressed concern that he could lose his job if convicted. Sutherland then indicated that if Smith took the breath test and registered over the limit of .08%, his privileges would be suspended for six months if convicted. Sutherland also advised Smith that if he refused he would face a one-year revocation of his privileges and would get a review hearing within ten days.

¶4 After an unsuccessful attempt to provide a breath sample, Smith told Sutherland that he did not think he should take the test. Sutherland advised Smith that he would consider that a refusal.

¶5 On December 18, 2006, the circuit court held a refusal hearing. The court found there was enough evidence to support probable cause for an arrest for operating while intoxicated. Additionally, the court found Smith's refusal unreasonable and revoked his operating privileges for a year. The court found that Sutherland complied with Wisconsin's implied consent statute by reading the Informing the Accused information. The court also found the excess information provided to Smith was not inaccurate under Wisconsin law and did not impair Smith's ability to make an informed decision.

DISCUSSION

¶6 Smith argues the circuit court erred in its finding that he improperly refused to submit to an evidentiary test of his breath as required by WIS. STAT. § 343.305. Under Wisconsin law, when a driver is alleged to have improperly refused an evidentiary test under § 343.305, the issues at the refusal hearing are limited to: (1) whether the officer that stopped the driver had probable cause to believe the driver was operating while intoxicated, (2) whether the officer properly informed the driver of their rights and responsibilities under the implied consent law, and (3) whether the defendant improperly refused the test. WIS. STAT. § 343.305(9)(a).

¶7 Smith first argues the officer did not have probable cause to arrest him. We review a probable cause determination without deference. *See* ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 316, 603 N.W.2d 541 (1999). The test of probable cause under the refusal hearing statute is less than the level of proof

necessary to establish probable cause for arrest but greater than the reasonable suspicion necessary to justify an investigative stop. ***Id.*** at 314.

¶8 At a refusal hearing, the State "must only present evidence sufficient to establish an officer's probable cause to believe the person was driving or operating a motor vehicle while under the influence of an intoxicant." ***State v. Nordness***, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986). Probable cause exists where the totality of the circumstances within the officer's knowledge at the time would lead a reasonable officer to believe a violation has occurred. ***Id.*** An officer does not in every case need to perform a field sobriety test. ***State v. Kasian***, 207 Wis. 2d 611, 622, 558 N.W.2d 687 (1996). "Whether probable cause to arrest exists based on the facts of a given case is a question of law which we review independently of the trial court." ***Id.*** at 621.

¶9 Smith argues that the officer did not have probable cause to arrest because "[t]he only evidence presented at the refusal hearing was that the deputy observed erratic driving at bar closing time, an odor of intoxicants on Mr. Smith's breath, and an admission of consuming alcohol." Smith further argues "there was no evidence of slurred speech, difficulty standing, bloodshot eyes, or other signs of impairment." Smith cites a footnote from ***State v. Swanson***, 164 Wis. 2d 437, 453 n.6, 475 N.W.2d 148 (1991), to support his position. However, the language in ***Swanson*** has since been qualified. *See* ***Kasian***, 207 Wis. 2d at 622. Smith's argument that an objective test, such as a field sobriety test, was needed in this case is incorrect. *See* ***id.*** In ***Kasian,*** the court held that an officer's observations of an accident scene and an intoxicated smelling man with slurred speech, constituted probable cause for arrest. ***Id.***

¶10 In this case, Sutherland observed Smith traveling at seventy-six miles per hour in a fifty-five-mile-per-hour zone at 2:40 a.m. Smith did not immediately pull over to the side of the roadway when Sutherland activated his lights and crossed the centerline twice in a short distance. Sutherland smelled intoxicants on Smith and Smith admitted drinking, stating he would "be lying if he told [Sutherland] he had just a couple beers." Considering the totality of the circumstances and the facts available to Sutherland, a reasonable officer could conclude there was probable cause to believe Smith was operating while intoxicated.

¶11 Smith next argues Sutherland violated Wisconsin's implied consent law by providing misleading information regarding the consequences Smith would face as a Louisiana resident. Wisconsin's implied consent law, WIS. STAT. § 343.305(1), "provides that anyone who drives a motor vehicle is deemed to have consented to a properly administered test to determine the driver's blood alcohol content." ***State v. Rydeski***, 214 Wis. 2d 101, 106, 571 N.W.2d 417 (Ct. App 1997). "Any failure to submit to such a test, other than because of physical inability, is an improper refusal which invokes the penalties of the statute." ***Id.***

¶12 The application of the implied consent statute to a set of facts is a question of law we review without deference. ***Id.*** When determining whether an officer satisfied the statutory requirements, we use a three-part test. ***County of Ozaukee v. Quelle***, 198 Wis. 2d 269, 280, 542 N.W.2d 196 (1995). First, we inquire whether the officer failed to meet or exceeded his or her duty to provide information to the accused driver pursuant to WIS. STAT. § 343.305(4). ***Id.*** If so, we determine whether the lack or oversupply of information misled the accused driver. ***Id.*** Finally, we determine whether the officer's failure to properly inform

the accused affected the accused's ability to make a choice about whether to submit to chemical testing. ***Id.***

¶13 In this case, Sutherland properly read Smith the Informing the Accused form. However, after Smith expressed concern over the possible consequences of the test, Sutherland provided additional information. Sutherland indicated that if Smith took the breath test and registered over the limit of .08, his privileges would be suspended for six months if convicted. Sutherland also advised Smith that if he refused, he would face a one-year revocation of his privileges and would get a review hearing within ten days.

¶14 Smith first argues the additional information Sutherland provided was incorrect because it was a misstatement of the penalties that would befall Smith in Louisiana, where he resides. However, Sutherland was not required to provide Smith with information regarding the penalties he would face in Louisiana. Sutherland did not misstate Wisconsin law when he informed Smith that if he took the breath test and registered over the .08% limit, his privileges would be suspended for six months if convicted but if he refused he would face a one-year revocation of his privileges. Therefore, this information was not misleading.

¶15 However, Sutherland also advised Smith that he would get a review hearing within ten days of his refusal. Smith argues this is a misstatement of Wisconsin law because the Wisconsin statute provides that a person may request a refusal hearing within ten days of receiving a notice of intent to revoke their operating privilege but the hearing will not necessarily occur within ten days. WIS. STAT. §§ 343.305(9)(am)(4), (10)(a).

¶16 The information Sutherland provided may have misled Smith because the statute did not actually guarantee that Smith would get a hearing within ten days. However, Smith has failed to prove that Sutherland's misstatement in any way affected his ability to make a choice about whether to submit to the breath test. When an officer exceeds his or her duty and provides additional information that is misleading, the party claiming the refusal was proper has the burden of production to make a prima facie showing of a causal connection between the misleading statements and the refusal. ***State v. Ludwigson***, 212 Wis. 2d 871, 873, 876, 569 N.W.2d 762 (Ct. App. 1997). Smith did not testify at his refusal hearing or introduce any evidence to show that Sutherland's misstatement affected his decision.

By the Court.—Order affirmed.

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