

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 19, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2008AP1976

Cir. Ct. No. 2008TR3867

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN THE MATTER OF THE REFUSAL OF JUAN M. MADRID:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JUAN M. MADRID,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Jefferson County:
JACQUELINE R. ERWIN, Judge. *Affirmed.*

¶1 VERGERONT, J.¹ Juan Madrid appeals the circuit court's order revoking his operating privilege because, the court determined, he improperly refused to submit to a chemical test of his blood upon arrest for operating while under the influence of an intoxicant (OWI) in violation of WIS. STAT. § 346.63(1)(a).² Madrid's primary contention is that the circuit court erred in concluding there was probable cause for his arrest for OWI. For the reasons we explain below, we affirm.

BACKGROUND

¶2 Madrid was arrested for OWI outside his apartment building by an officer who had come to investigate a noise complaint in apartment C. The officer testified as follows at the suppression hearing. The officer was at the rear of the building when he observed a car pull into the back parking lot. A man, later identified as Madrid, got out of the driver's seat and walked toward the apartment building and toward the officer, leaving the headlights on. Because it was an older model vehicle, the officer assumed the headlights had to be turned off. A female got out of the front passenger seat of the vehicle and began to walk in the same direction as Madrid. Madrid turned, walked back toward her and handed her the keys to the car, saying something that the officer was unable to understand.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(g) and (3) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

² WISCONSIN STAT. § 343.305(3)(a) requires that, upon arrest for a violation of WIS. STAT. § 346.63(1), "a law enforcement officer may request the person to provide one or more samples of his or her breath, blood or urine" to test for the presence of alcohol and certain other substances. If the person refuses, the law enforcement officer must issue a notice of intent to revoke the person's operating privilege, and the person may request a hearing on the revocation under § 343.305(9)(a). The issues at the hearing are limited by statute and one of the issues is whether there was probable cause to arrest. Section 343.305(9)(a) and (c).

Madrid then made a call on his cell phone and the officer heard him say something to the effect of “watch out; the police are here.”

¶3 At this point the officer stepped out of the shadows, identified himself to Madrid, and asked to whom Madrid was speaking. Madrid became extremely upset, telling the officer it was none of his business, swearing, and walking toward the officer in an aggressive posture. The officer told Madrid he was there to investigate a noise complaint in apartment C. Madrid responded that there was always noise there, no officer had come before, and he should not be there now. The officer explained that he was concerned about who Madrid was speaking to because he did not want Madrid to warn the people in apartment C that he (the officer) was there. As Madrid came closer, the officer could smell the strong odor of intoxicants coming from him and saw that his eyes were glassy and bloodshot and his speech was slurred. On cross-examination, the officer acknowledged that in his report he did not write that Madrid had bloodshot and glassy eyes until just prior to his description of the field sobriety tests, but he indicated he first observed this when Madrid initially passed slowly by him.

¶4 Madrid continued yelling at the officer in an angry and aggressive manner, telling him that he should get off his property and that he did not have a right to be there. In response, the officer stepped onto the sidewalk. Because of Madrid’s belligerence, the officer called his partner, who was at the front of the building, to come to the back for his protection.

¶5 Although the officer wanted Madrid to stop and speak to him further, Madrid went into his apartment, apartment A. The two officers spoke with the female who had gotten out of the car. She apologized for Madrid’s

behavior and said he was acting that way only because he was drunk. She went back to the car and turned off the headlights.

¶6 The officer knocked on Madrid's apartment door in an attempt to get Madrid to come out and speak with him. However, the officer did not believe Madrid knew he knocked. Subsequently, Madrid did come out of his apartment, yelling expletives and telling officers to leave the yard of his apartment because they had no right to be there. At this point the officer detained Madrid because he believed that he might have been driving while intoxicated. The officer asked Madrid if he had been consuming alcohol and Madrid answered he had had approximately four beers.

¶7 The officer administered the standardized field sobriety tests to Madrid. On the Horizontal Gaze Nystagmus (HGN) test, the officer observed all six "clues" indicating impairment. In addition, Madrid was swaying during this test. At the beginning of the test, Madrid told the officer that two weeks ago he had struck his head against a rock and that caused a slight cut to his head. He also said he did not seek medical attention and did not believe he had any lingering side effects. On cross-examination, the officer disagreed that a head injury could explain the six "clues" on the HGN test because, he stated, he observed equal tracking ability and equal pupil size in each eye and that would not be the case if someone had suffered a head injury, such as a concussion, immediately before the HGN test.

¶8 On the walk-and-turn test, the officer observed four "clues": Madrid stepped out of the instructional position numerous times to maintain his balance, stepped off of the line, raised his arms more than six inches away from his body,

and he “missed heel to toe.” The officer viewed this as a failure of the test because two or more clues is a failure.

¶9 On the one-leg-stand test, Madrid used his arms for balance and put his foot down three times. The officer considered this conduct to show all four “clues” of impairment.

¶10 At this point, the officer placed Madrid under arrest for OWI. Madrid was then transported to the Watertown Police Department where the officer read the “informing the accused” document.

¶11 The circuit court determined that the officer did not detain Madrid until Madrid came out of his apartment after having gone into it. The court concluded that the officer had reasonable suspicion at that time to believe that Madrid had been operating a vehicle while under the influence of an intoxicant based on his leaving the headlights on, the odor of intoxicants, his bloodshot and glassy eyes, his slurred speech, his loud and aggressive manner, and the statement by the passenger that he was drunk. With the additional information of his performance on the field sobriety tests, which the court found indicated impairment, the court concluded there was probable cause to arrest him for OWI. Accordingly, the court concluded that Madrid improperly refused to submit to a chemical test, and it revoked his operating privilege. *See* WIS. STAT. § 343.305(9) and (10).

DISCUSSION

¶12 Madrid's primary argument on appeal is that the officer lacked probable cause to arrest him. The first part of his argument is that the officer was located within the curtilage³ of Madrid's apartment and therefore any observations he made while at that location could not lawfully be used to establish probable cause. The State responds that Madrid did not raise this argument below, the court therefore did not rule on it, and from the record it is not clear whether or not the officer was on the curtilage of Madrid's apartment. Madrid replies that he did raise it and points to certain references in his argument to the officer's location. He also contends that, implicit in the notion of probable cause, is that the observations must be lawful and this includes the issue of curtilage.

¶13 We agree with the State that Madrid did not bring the issue of the officer's presence on the curtilage of his apartment to the attention of the circuit court in a way that indicated that the court was expected to rule on it. Most significantly, in argument to the court after the evidentiary hearing, Madrid's counsel stated: "By way of that diagram, it would appear when he officially had contact, that's in fact on Mr. Madrid's property. I don't want to get into legal terms like curtilage or something, Judge; but certainly can be construed that way." Rather than indicating to the court that it is being asked to decide whether the officer was located on the curtilage of Madrid's apartment, this statement informs the court that Madrid is not raising that issue for the court's determination.

³ A curtilage is the land and buildings immediately surrounding a house. *State v. Martwick*, 2000 WI 5, ¶1 n.2, 231 Wis. 2d 801, 604 N.W.2d 552.

¶14 The general rule is that we do not decide issues on appeal that were not properly raised in the circuit court, and this rule is particularly applicable when the issue involves questions of fact not resolved by the circuit court. *See Evjen v. Evjen*, 171 Wis. 2d 677, 688, 492 N.W.2d 361 (Ct. App. 1992). The issue of curtilage presents a mixed question of fact and law. *State v. Martwick*, 2000 WI 5, ¶16, 231 Wis. 2d 801, 604 N.W.2d 552. We accept the circuit court’s findings of fact unless they are clearly erroneous and we then evaluate the application of the legal standard for curtilage to the facts found by the circuit court. *Id.*, ¶18. Because the circuit court was not asked to decide the curtilage issue, it made no findings of fact and we therefore have no findings to review. Although we could review the application of a legal standard to undisputed facts in a record, if the record was sufficiently developed, in this case the record on curtilage is not sufficiently developed for us to conclude that the necessary facts to meet the legal standard are undisputed.⁴

¶15 Accordingly, we conclude that Madrid has waived the right to raise the curtilage issue on appeal and we will not address it.

¶16 Although not contained in a separate heading or developed as a separate argument, Madrid appears to argue that the officer detained Madrid when

⁴ The factors that are considered in determining whether an area is protected curtilage are:

the proximity of the area claimed to be curtilage to the home[;]
whether the area is included within an enclosure surrounding the
home[;] the nature of the uses to which the area is put[;] and the
steps taken by the resident to protect the area from observation
by people passing by.

United States v. Dunn, 480 U.S. 294, 301 (1987).

he was first going into his apartment, and at that time he did not have reasonable suspicion to detain him. *See Terry v. Ohio*, 392 U.S. 1, 21-22 (1968). However, the circuit court determined that a detention did not occur at that time because Madrid did not stop, although the officer wanted him to. The State points this out in its brief in response, and in his reply brief Madrid does not explain why the court's determination on this point is erroneous, either legally or factually. Accordingly, we take this as a concession that the circuit court was correct on this point. *See Schlieper v. DNR*, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (proposition asserted by respondent on appeal and not disputed in the reply brief is taken as admitted).

¶17 We now turn to the issue whether there was probable cause for Madrid's arrest. At a refusal hearing pursuant to WIS. STAT. § 343.305(9), the State must 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 is that quantum of evidence that would lead a reasonable police officer to believe the defendant probably committed a crime, and it is measured by the totality of circumstances within the arresting officer's knowledge at the time of the arrest. *Id.* The State's burden of persuasion in a refusal hearing is substantially less than at a suppression hearing: the State "need only show that the officer's account is plausible, and the court will not weigh the evidence for and against probable cause or determine the credibility of the witnesses" as it must do at a suppression hearing. *State v. Wille*, 185 Wis. 2d 673, 681, 518 N.W.2d 325 (Ct. App. 1994).

¶18 In reviewing a circuit court's determination on probable cause, we uphold the findings of fact unless they are clearly erroneous and review de novo

whether those facts satisfy the standard of probable cause. See *County of Jefferson v. Renz*, 231 Wis. 2d 293, 316, 603 N.W.2d 541 (1999).

¶19 Based on the facts found by the circuit court and the undisputed facts, we conclude there was ample basis for probable cause. The officer had probable cause to believe Madrid had been consuming alcohol because Madrid smelled of alcohol, he said he had had approximately four beers and his female passenger said he was drunk. The following circumstances taken together are more than adequate for a reasonable officer to believe that his consumption of alcohol had impaired his ability to drive safely: his failing to turn off the headlights on his car, his belligerent and disorderly conduct toward the officer, his glassy and bloodshot eyes, his slurred speech, the female passenger's statement that he was drunk, and his performance on the field sobriety tests.

¶20 Madrid contends that the results of the HGN test should not be considered because the officer dismissed Madrid's head injury as a possible cause of the results. However, based on what Madrid himself told the officer about hitting his head—that it occurred two weeks ago, that he had a minor cut, that he did not go the hospital, and that he had no side effects—it was reasonable for the officer to conclude that the incident did not explain the results of the test. Moreover, even if the prior incident were a plausible explanation in these circumstances, an officer need not accept an innocent explanation for events when there is a reasonable explanation that supports probable cause. *State v. Nieves*, 2007 WI App 189, ¶14, 304 Wis. 2d 182, 738 N.W.2d 125.

¶21 Madrid also contends that the officer's testimony on his performance on the walk-and-turn and one-leg-stand tests failed to demonstrate any impairment. We disagree. The officer's description of Madrid's performance on

both tests provide a reasonable basis to infer that his balance and coordination were impaired.

CONCLUSION

¶22 We conclude the circuit court correctly determined that the officer had probable cause to arrest Madrid for OWI and therefore correctly determined that his refusal to submit to a test under WIS. STAT. § 343.305(3)(a) was improper.

By the Court.—Order affirmed.

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

