

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 8, 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. 2009AP384-CR

Cir. Ct. No. 2007CT4050

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROCHELLE M. PETERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: JOHN W. MARKSON, Judge. *Reversed.*

¶1 BRIDGE, J.¹ Rochelle Peters appeals from a judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration (PAC), fourth offense, in violation of WIS. STAT. § 346.63(1)(b), and the circuit

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

court's order denying her motion to suppress evidence gained as a result of the investigatory stop of Peters' vehicle. Peters contends the circuit court erroneously denied her motion to suppress for the following three reasons: (1) the arresting officer lacked reasonable suspicion to believe she violated "any drunk driving or alcohol related laws"; (2) the arresting officer lacked probable cause to administer the preliminary breath test; and (3) without the results of the preliminary breath test, the arresting officer did not have probable cause to arrest her for violating § 346.63(1)(a) and (b). We agree with Peters' second and third contentions and therefore reverse.

BACKGROUND

¶2 The following facts are undisputed. On October 30, 2007, Jeremy Michel, a police officer with the Village of McFarland police department, stopped Peters' vehicle for what appears to have been a registration violation. After identifying Peters, Michel became aware that there was an outstanding warrant for her arrest and that she had prior offenses for operating a motor vehicle while intoxicated (OWI). While placing Peters in handcuffs, apparently for the outstanding warrant, Michel observed a slight odor of alcohol on Peters' breath. Michel asked Peters if she had been drinking and she acknowledged that earlier she had consumed two beers. Michel testified that although Peters did not seem impaired and he had no reason to believe she was intoxicated, he wanted to verify if she was intoxicated in light of her prior offenses and the odor of alcohol. He testified that he wished to do so, not in furtherance of an investigation into whether Peters was possibly operating her vehicle in violation of WIS. STAT. § 346.63(1)(a) or (b), but because a jail regulation prohibited inmates from being booked while intoxicated.

¶3 With Peters' consent, Michel administered the preliminary breath test. Michel testified that when the test indicated that Peters had an alcohol concentration of 0.02, he discontinued the test even though the number was continuing to go up. Michel explained that at that point, he "was going to investigate the driving that I observed as a possible OWI offense. It was [his] intention to review the driving record, to check prior offenses, and also to transport [Peters] back to [the] McFarland Police Department to complete field sobriety testing."

¶4 After discontinuing the PBT, Michel rechecked Peters' record and ascertained that she had three prior offenses for operating a motor vehicle while under the influence of an intoxicant, which meant that the maximum legal blood alcohol concentration for her was 0.02. Michel informed Peters that he was now investigating the matter as an investigation into whether she was operating her vehicle under the influence and would be transporting her to the police station to conduct field sobriety tests. When they arrived at the station, Michel advised Peters that after he read her Miranda rights, he was going to request that she conduct field sobriety tests. After Michel read her Miranda rights, Peters requested an attorney. Michel testified that because Peters requested an attorney, he assumed that she did not wish to proceed with field sobriety testing and therefore he did not ask whether she wished to perform the tests. Michel then placed Peters under arrest for OWI, fourth offense, in violation of WIS. STAT. § 346.63(1)(a), and PAC, fourth offense, in violation of WIS. STAT. § 346.63(1)(b).

¶5 Peters moved to suppress all evidence obtained as a result of her detention on the following bases: (1) the detention was unreasonably extended to include an investigation of whether she was operating her vehicle while under the

influence of alcohol without reasonable suspicion; (2) the preliminary breath test was administered without probable cause; and (3) she was arrested for violating WIS. STAT. § 346.63(1)(a) and (b) without probable cause.² The court denied the motion. The court ruled that Michel properly administered the preliminary breath test because the test was not administered as a means of determining whether or not there was probable cause to believe Peters was guilty of OWI, but instead because the officer “deemed it appropriate and in accordance with jail policy to do further investigation and determine whether she had been drinking.” The court also ruled that Michel had probable cause to arrest Peters in light of the preliminary breath test results, her admission of drinking, and Michel’s knowledge that because Peters had three prior convictions for operating a motor vehicle while under the influence of an intoxicant, she was subject to a lower legal limit of alcohol concentration.

¶6 Peters moved for reconsideration of the denial of her motion to suppress, which was denied. Peters then pled no contest to operating a motor vehicle with a prohibited alcohol concentration, and was sentenced to seventy days in jail with Huber privileges. Peters appeals. We reference additional facts as needed in our discussion below.

DISCUSSION

¶7 Peters challenges the circuit court’s denial of her suppression motion and the judgment of conviction. She contends that her motion was improperly denied for three reasons: (1) the investigatory stop was unconstitutional because

² At the hearing on her motion to suppress, Peters did not dispute the reasonableness of the stop.

Michel lacked reasonable suspicion to conduct the stop; (2) Michel lacked probable cause to request that she submit to a preliminary breath test; and (3) without the results of the preliminary breath test, Michel lacked probable cause to arrest her for violating WIS. STAT. § 346.46(1)(a) and (b).

¶8 When reviewing an order on a motion to suppress, we uphold the circuit court's factual findings unless clearly erroneous. *State v. Drew*, 2007 WI App 213, ¶11, 305 Wis. 2d 641, 740 N.W.2d 404, *review denied*, 2008 WI 6, 306 Wis. 2d 48, 744 N.W.2d 297. However, the application of constitutional principles to those facts is a question of law that we review independently. *Id.* Here, the facts are undisputed and, therefore, only questions of law are before us. *See id.*

ADMISSIBILITY OF THE PRELIMINARY BREATH TEST RESULTS

¶9 Peters contends that prior to administering the PBT, Michel lacked probable cause to believe she had violated WIS. STAT. § 346.63(1)(a) and (b) and, therefore, the results of the test were inadmissible under WIS. STAT. § 343.303.³ The State counters that PBTs may be utilized as an investigatory tool outside the context of an OWI investigation and that because Michel was not using the test as a tool to investigate a possible offense under § 346.63(1) at the time it was administered, the results of the test were not inadmissible under § 343.303. We agree with Peters that the results of her PBT were inadmissible.

³ WISCONSIN STAT. § 343.303 provides, "If a law enforcement officer has probable cause to believe that the person is violating or has violated s. 346.63(1) ... the officer, prior to an arrest, may request the person to provide a sample of his or her breath for a preliminary breath screening test using a device approved by the department for this purpose."

¶10 WISCONSIN STAT. § 343.303 authorizes a law enforcement officer to request that a person submit to a PBT if the officer has probable cause to believe that the person has violated or is violating a variety of offenses enumerated in the statute, including OWI in violation of WIS. STAT. § 346.63(1) or (2m).⁴ The statute further provides, however, that the results of a PBT are inadmissible “in any action or proceeding except to show probable cause for an arrest, if the arrest is challenged, or to prove that a chemical test was properly required or requested of a person under s. 343.305(3).” Section 343.303.

¶11 In *State v. Beaver*, 181 Wis. 2d 959, 969-72, 512 N.W.2d 254 (Ct. App. 1994), we interpreted the breadth of the limitation on PBT evidence admissibility under WIS. STAT. § 343.303. We explained that the “thrust of this statute is to give a police officer the authority to request a driver to submit to a PBT” and to then use the results of the PBT in making the final determination of whether to effectuate an arrest. *Id.* at 969. We concluded that when viewed in context, the statutory bar against PBT evidence in § 343.303 applies “only in proceedings relating to arrests for offenses contemplated under that statute,” including WIS. STAT. § 346.63 violations. *Id.* at 970. In *State v. Repenshek*, 2004 WI App 229, ¶25, 277 Wis. 2d 780, 691 N.W.2d 369 (2004), we further explained that § 343.303 “only imposes a limitation on the use of a PBT result in a particular situation, that is, where the requesting officer wants to use the PBT *result* to support a drunk driving arrest or to support a non-consent blood draw.” In other situations, an officer’s use of a PBT is not limited by § 343.303. For example, an

⁴ The other offenses specified in WIS. STAT. § 343.303 include injury by intoxicated use of a motor vehicle in violation of WIS. STAT. § 940.25 and homicide by intoxicated use of a vehicle in violation of WIS. STAT. § 940.09. WIS. STAT. § 343.303.

officer may ask a minor attending an underage drinking party to submit to a PBT in order to make preliminary determinations as to whether the minor has been drinking. *Id.*

¶12 It is apparent that WIS. STAT. § 343.303 does not restrict the admissibility of PBT results in all types of proceedings. *See, e.g., State v. Doerr*, 229 Wis. 2d 616, 622, 599 N.W.2d 897 (Ct. App. 1999) (PBT results admissible evidence for battery charges). It does, however, restrict the admissibility of PBT results in all proceedings relating to violations of WIS. STAT. § 346.63(1). Although the PBT in the present case was not, in the first instance, conducted in furtherance of an investigation into whether Peters was operating her vehicle in violation of § 346.63(1), the State sought to use the results of the test to prove that she had violated that provision. Because the State sought to admit the results of Peters' PBT in a proceeding relating to a violation of § 346.63(1), we conclude that the limitation on the admissibility of those results found in § 343.303 applies.

¶13 Under WIS. STAT. § 343.303, PBT evidence is admissible to prove probable cause to arrest for a violation of WIS. STAT. § 346.63(1) only if the officer has probable cause to believe that the person has violated or is violating that statute. The State does not contend that Michel had probable cause to believe that Peters was driving in violation of § 346.63(1) prior to administering the PBT, and we agree that he did not. Accordingly, we conclude that the results of the test are inadmissible under WIS. STAT. § 343.303.

PROBABLE CAUSE TO ARREST

¶14 For a warrantless arrest to be lawful, it must be based on probable cause. *State v. Lange*, 2009 WI 49, ¶19, 766 N.W.2d 551. Probable cause to arrest for OWI and PAC exists when the totality of the circumstances within the

arresting officer's knowledge at the time of the arrest are such that a reasonable police officer would believe that the defendant probably operated a motor vehicle while under the influence of an intoxicant and with a prohibited alcohol concentration. *See id.* The burden is on the State to show the existence of probable cause to arrest. *Id.*

¶15 In reviewing a circuit court's determination as to whether probable cause existed for an arrest, we will uphold the court's factual findings unless they are clearly erroneous, but review de novo whether those facts satisfy the standard of probable cause. *County of Jefferson v. Renz*, 231 Wis. 2d 293, 316, 603 N.W.2d 541 (1999). We do so on a case-by-case basis, looking at the totality of the circumstances. *Lange*, 2009 WI 49, ¶20.

¶16 Peters contends that with or without the PBT results, the facts indicating she was intoxicated did not establish probable cause to arrest her for violating WIS. STAT. § 346.63(1)(a) and (b). The State responds that Michel had probable cause for an arrest in light of the following: (1) Michel detected the odor of intoxicants; (2) Peters admitted that she had been drinking; (3) the result of the PBT was .02 when the test was aborted, which was Peters' legal limit; and (4) Peters declined to perform the field sobriety tests. We agree with Peters that under the totality of the circumstances, Michel did not have probable cause for her arrest.

¶17 For the reasons discussed above in ¶¶9-13, the results of Peters' PBT were inadmissible to establish whether Michel had probable cause to arrest Peters for violating WIS. STAT. § 346.63(1)(a) and (b). In addition, it is clear from Michel's testimony at the suppression hearing that Peters did not decline to perform field sobriety tests. Michel testified:

I explained to her I *was going to* be requesting that she conduct field sobriety testing. I explained to her that I could not do that field sobriety testing until I read her her Miranda warnings. Upon her telling me that she needed an attorney, I did not proceed. I did not ask her any further questions at that time. I assumed that she did not want to proceed with the field sobriety testing. (Emphasis added.)

Michel indicated to Peters that he would be asking her to perform the field sobriety tests at a point in the future, but he never did. There could, therefore, have been no refusal on Peters' part to perform the tests since she was never actually asked to do so. Thus, the totality of the circumstances within Michel's knowledge at the time of arrest included his observation of what he described as a faint odor of alcohol on Peters' breath, Peters' admission that she had consumed two beers earlier, and Michel's knowledge that Peters had a lower legal blood alcohol concentration limit as a result of her prior OWI convictions. This evidence is viewed in light of Michel's testimony that Peters did not appear impaired, his testimony that he had no reason to believe Peters was intoxicated before administering the PBT, the fact that Peters was not driving dangerously or erratically prior to being stopped, and the unknown time frame for her alcohol consumption.

¶18 WISCONSIN STAT. § 346.63(1)(a) and (b) do not prohibit operating a motor vehicle after having consumed alcohol. Rather, sub. (a) prohibits driving “[u]nder the influence of an intoxicant ... to a degree which renders [one] incapable of safely driving” and sub. (b) prohibits driving with “a prohibited alcohol concentration.” See *County of Jefferson v. Renz*, 222 Wis. 2d 424, 444, 588 N.W.2d 267 (Ct. App. 1998), *rev'd on other grounds*, 231 Wis. 2d 293, 603 N.W.2d 541 (1999). We conclude that under these circumstances, Michel's knowledge at the time of Peters' arrest would not have led a reasonable police officer to believe that Peters was intoxicated to a degree rendering her incapable of

driving safely or that she had a prohibited alcohol concentration. We therefore conclude that probable cause did not exist to arrest Peters for violating § 346.63(1)(a) and (b) and that the circuit court erred in ruling otherwise.⁵

CONCLUSION

¶19 For the reasons discussed above, we reverse the judgment and order of the circuit court.

By the Court.— Judgment and order reversed.

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

⁵ Because we conclude that Michel did not have probable cause to request that Peters submit to the PBT and did not have probable cause for an arrest, we do not address Peters' remaining argument that the investigatory stop was unconstitutional because Michel lacked reasonable suspicion to conduct an investigatory stop. See *Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (if a decision on one point disposes of the appeal, the court will not decide other issues raised).

