COURT OF APPEALS
DECISION
DATED AND RELEASED

May 8, 1996

No. 95-3239

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROMAN G. BROTZ,

Defendant-Appellant.

APPEAL from an order of the circuit court for Sheboygan County: L. EDWARD STENGEL, Judge. *Affirmed*.

BROWN, J. Roman G. Brotz raises due process and equal protection challenges to the blood alcohol testing procedures authorized under the implied consent law. He argues that the margin of error calculation for breath alcohol testing machines which is promulgated by the Department of Transportation (DOT) unfairly discriminates against drivers who are near that line where a breath alcohol concentration becomes presumptive evidence of actual intoxication. We conclude, however, that Brotz has no standing to bring

either of his constitutional challenges because his test results, even accounting for the margin of error, were so far over the line that he would not benefit by the legal precedent he seeks to make. We affirm his conviction for operating a motor vehicle while intoxicated.

An officer from the Sheboygan County Sheriff's Department stopped Brotz in the early morning hours of September 12, 1994, because he suspected Brotz of drunk driving. Brotz agreed to take a breath test. The test was performed by an Intoxilyzer 5000 and yielded two results of .214 and .233 grams of alcohol per 210 liters of breath. This evidence led to Brotz's conviction of operating a vehicle with a prohibited alcohol concentration. *See* § 346.63(1)(b), STATS.

Brotz now renews the constitutional challenges he made before the trial court. He develops this argument as follows. He begins with an explanation of how Wisconsin's drunk-driving law prohibits a person from driving when he or she has too great an alcohol concentration within his or her system. *See* ***id.***; *but cf.* ***State v. McManus***, 152 Wis.2d 113, 122-24, 447 N.W.2d 654, 657 (1989) (explaining that former § 346.63(1)(b), STATS., 1987-88, determined liability on the basis of breath test results).[1] He further contrasts Wisconsin's current law with those jurisdictions that determine liability based on whether the driver's breath or blood test result is above a certain level. *See*

[1] In 1992, the legislature changed § 346.63(1)(b), STATS. The language basing liability on whether the driver had "0.1 grams or more of alcohol in 210 liters of that person's breath" now inquires if the driver "has a prohibited alcohol concentration." *See* 1991 Wis. Act. 277, § 38.

McManus, 152 Wis.2d at 125, 447 N.W.2d at 658 (citing ***State v. Brayman***, 751 P.2d 294, 298 (Wash. 1988)).

Nonetheless, under this state's law, Brotz explains that the risk of a potentially flawed test presents a constitutional threat to drivers because they may not be actually intoxicated (and hence in violation of the law) even though they yield a positive result. He notes that when a driver's breath test result is above .10 grams per 210 liters of breath, the statutory presumption of unlawful intoxication is triggered. *See* § 885.235(1)(c), STATS. But because of the margin of error accepted under the DOT regulations, Brotz explains that a driver's actual breath alcohol concentration could be miscalculated by .01 gram. Hypothetically, a driver who only had a breath alcohol concentration of .09 grams could still trigger the statutory presumption because the machine's margin of error may add .01 gram to the actual result.

The DOT regulations which Brotz targets as the source of the problem provide in pertinent part:

> **Procedure for testing and certifying the accuracy of breath alcohol test instruments.** (1) All quantitative breath alcohol test instruments approved for use in this state shall be tested and certified for accuracy in accordance with the following standards:
>
> ....
>
> (b) Each test for accuracy shall include, but not be limited to, an instrument blank analysis and an analysis utilizing a calibrating unit. The result of the calibrating unit analysis shall fall within 0.01 grams of alcohol per 210 liters of the established reference value.

WISCONSIN ADM. CODE § TRANS 311.10. The "due process problem" that Brotz sees with the DOT's .01 gram margin of error is that the state is "permitted to shirk its responsibility to prove guilt beyond a reasonable doubt." He seems to argue that the possibility of a .01 gram error always creates a reasonable doubt and he must therefore be allowed some means to challenge the DOT's selection of this standard before his test results are deemed presumptive evidence that he was intoxicated. *See* § 885.235(1)(c), STATS. Similarly, Brotz sees an "equal protection problem" with the DOT regulations because they treat drivers "within the margin of error disparately from those outside the margin of error of the machine."

We conclude, however, that Brotz does not have standing to raise either of these alleged constitutional infirmities. Whether a person has standing is a question of law which we review de novo. ***Mogilka v. Jeka***, 131 Wis.2d 459, 467, 389 N.W.2d 359, 362 (Ct. App. 1986). We employ a two-pronged test to determine if a person has standing. First, we ask if the person was injured in fact. ***Id***. Next, we gauge if the person's injury falls within the zone of interest protected by the constitutional guarantee in question. ***Id***.

Brotz was not injured in fact and thus fails the first prong of the test. His lowest test result was .214 grams. Thus, the greatest effect that the DOT's margin of error could have had was to falsely report his actual breath alcohol concentration at this level when it was actually .204 grams. At the lower level, however, Brotz was still more than 100% over the amount that triggers the presumption of intoxication. *See* § 885.235(1)(c), STATS. Because Brotz's test

results were so high, the possible constitutional problems in the DOT's selection of .01 gram as an appropriate margin of error has not had any effect.

Indeed, when we examine the cases that Brotz cites to support his constitutional arguments, we see that each of the defending drivers was very near the line at which a test result triggered liability. For example, in ***Haynes v. State Dep't of Pub. Safety***, 865 P.2d 753, 754 (Alaska 1993), the driver had a test result of .106 grams per 210 liters of breath. Although the margin of error under that state's drunk-driving law was also .01 gram, the driver in that case could have had an actual breath alcohol content as low as .096 grams. *See* ***id***. So while ***Haynes*** may support Brotz's legal analysis, important facts of the case make it distinguishable. *See also* ***State v. Boehmer***, 613 P.2d 916, 917-18 (Haw. Ct. App. 1980) (blood alcohol test reading at .11% could represent actual blood alcohol content as low as .0935%); ***State v. Bjornsen***, 271 N.W.2d 839, 840 (Neb. 1978) (blood alcohol test reading of .10% could represent actual blood alcohol content of .095%); ***State v. Keller***, 672 P.2d 412, 413 (Wash. Ct. App. 1983) (registered reading of .10% could represent actual alcohol content of .09%). Since Brotz's test results do not raise similar concerns that he may have been affected by the DOT's selection of a .01 gram margin of error, we hold that he has no standing and reject his constitutional challenges.

By the Court. – Order affirmed.

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