

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

July 30, 1996

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

NOTICE

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

No. 96-0548-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

State of Wisconsin,

Plaintiff-Respondent,

v.

William W. Gandt,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

WEDEMEYER, P.J.¹ William W. Gandt appeals from a judgment entered after a jury found him guilty of one count of operating a motor vehicle while under the influence of an intoxicant, contrary to §§ 346.63(1)(a), and 346.65(2), STATS. Gandt claims that: (1) the trial court erred in denying his motion to suppress the results of the intoxilyzer test; (2) he received ineffective assistance of counsel; and (3) admission of certain testimony and giving a certain jury instruction constituted plain error pursuant to § 901.03(4), STATS. Because the trial court did not err in denying Gandt's motion to suppress;

¹ This appeal is decided by one judge pursuant to § 752.31(2), STATS.

because the issue of ineffective assistance is not properly before this court; and because there was not plain error, this court affirms.

I. BACKGROUND

On August 4, 1993, at approximately 2:10 a.m., Gandt was arrested for operating a motor vehicle while under the influence of an intoxicant. He agreed to submit to a chemical test of his breath. The intoxilyzer test resulted in a reading of .13%. According to the record card, the breath test was administered after observing Gandt for a period of seventeen minutes.

The Wisconsin Administrative Code requires an observation of twenty minutes prior to administering the test. *See* TRANS, § 311.06. On this basis, Gandt moved to suppress the results of the test. The trial court denied the motion to suppress, but ordered that as a result of the violation, the State would not have the benefit of the presumption regarding automatic admissibility of the test.

The trial court submitted revised instructions to the jury, which eliminated the automatic admissibility language. The jury returned a guilty verdict. Gandt now appeals.

II. DISCUSSION

A. Motion to Suppress.

Gandt argues that the remedy for violating the twenty minute observation time should be suppression of the test results. Instead of ordering suppression, the trial court ruled that the State would not have the benefit of the presumption that the test results are automatically admissible.

A motion to suppress evidence raises a constitutional question, which presents a mixed question of fact and law. To the extent the trial court's

decision involves findings of evidentiary or historical facts, those findings will not be overturned unless they are clearly erroneous. *State v. Krier*, 165 Wis.2d 673, 676, 478 N.W.2d 63, 65 (Ct. App. 1991). The application of constitutional and statutory principles to the facts found by the trial court, however, presents a matter for independent appellate review. *Id.*

This court concludes that the trial court did not err in denying Gandt's motion to suppress. Gandt failed to present any authority to the trial court to support his contention that a violation of the twenty minute observation period requires suppression of the test results. Moreover, applicable case law holds that such a violation is a question addressed to the test result's credibility rather than its admissibility. *City of New Berlin v. Wertz*, 105 Wis.2d 670, 674, 314 N.W.2d 911, 913 (Ct. App. 1981).² Accordingly, this court rejects Gandt's claim that the trial court should have granted his motion to suppress.

B. Ineffective Assistance.

Next, Gandt claims that his trial counsel provided him with ineffective assistance. This issue, however, was not raised at the trial court level. Accordingly, it is not properly before this court and this court cannot address it. See *State v. Machner*, 92 Wis.2d 797, 285 N.W.2d 905 (1979).

C. Plain Error.

Finally, Gandt claims that certain objectionable evidence was admitted, and that a certain jury instruction should not have been given, and these constituted plain error. Specifically, Gandt claims that the intoxilyzer test

² Gandt argues for the first time on appeal that “public policy concerns regarding the accuracy and fairness of administering breath tests” calls for suppression of the test results. Although Gandt's argument is a novel and interesting one, he does not cite any authority that directly supports his proposition. He cites instead a case that discusses public policy concerns based on the administrative code regarding employment issues. See *Winkelman v. Beloit Memorial Hosp.*, 168 Wis.2d 12, 483 N.W.2d 211 (1992). *Winkelman*, however, has nothing to do with whether intoxilyzer test results must be suppressed if the 20 minute observation period is violated.

results should not have been admitted because of a lack of proper foundation and that the language of a certain jury instruction contained a presumption, which the trial court had previously ruled was not available to the State.

In order for an error to be “plain” within the meaning of the rule under § 901.03(4), Stats., it must be “so fundamental that a new trial or other relief must be granted” *Virgil v. State*, 84 Wis.2d 166, 191, 267 N.W.2d 852, 864-65 (1978). A “plain error” is one that is “both obvious and substantial” or “grave,” *id.*, 84 Wis.2d at 191, 267 N.W.2d at 865, and the rule is “reserved for cases where there is a likelihood that the [error] ... has denied a defendant a basic constitutional right.” *State v. Sonnenberg*, 117 Wis.2d 159, 178, 344 N.W.2d 95, 104 (1984).

The basis for Gandt's contention is that the trial court ordered the State to prove the admissibility of the test instead of benefitting from the presumption normally associated with the test results. He claims that the State's introduction of the test results lacked a proper foundation and if trial counsel would have objected, the trial court could have excluded this evidence. He also claims that the jury instruction language which automatically extrapolates the test results back to the time of driving should not have been submitted to the jury.

After reviewing the record, this court concludes that Gandt has not presented a situation of plain error. Regarding the admissibility of the test results, the record demonstrates that a proper foundation to admit the test results was laid through the testimony of an expert witness. Regarding the jury instruction language that Gandt complains about, this particular language was not the subject of the trial court's ruling regarding presumptions. The presumptions taken away from the State related only to the underlying scientific reliability of the intoxilyzer test—not to the presumption regarding extrapolating back to the time of driving. The record demonstrates that the trial court modified the jury instructions so that the automatic admissibility language was removed. This modification was the remedy for the violation of the observation period. Accordingly, the instant case does not present one of plain error, and this court rejects Gandt's claim.

By the Court.—Judgment affirmed.

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