COURT OF APPEALS
DECISION
DATED AND RELEASED

August 20, 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. 96-0873-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WALTER RIECKHOFF,

Defendant-Appellant.

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

CURLEY, J. Walter Rieckhoff appeals from a judgment of conviction, on a no contest plea, for operating a motor vehicle while under the influence of an intoxicant. He also appeals from an order denying his postconviction motion for a new trial. Rieckhoff raises essentially one issue for review—whether the trial court erroneously exercised its discretion when it denied his motion to withdraw his no contest plea based upon his claim of newly-discovered evidence. The basis for his motion was his post-sentencing discovery that the Intoxilyzer machine utilized at the time of his arrest had not been serviced within the mandated 120-day period, thereby denying to the State

an automatic admission of his Intoxilyzer results. *See* § 343.305(5) and (6), STATS. Because Rieckhoff has failed to prove by clear and convincing evidence that this newly-discovered information was likely to lead to a different result, the trial court did not erroneously exercise its discretion in denying his motion to withdraw his no contest plea. As a result, the judgment and order are affirmed.[1]

I. BACKGROUND.

The facts which surround this controversy are as follows. Rieckhoff was arrested on June 12, 1995, by City of Cudahy police. According to the complaint, the arresting officer noticed that Rieckhoff had bloodshot eyes, slurred his speech, and had an odor of intoxicants on his breath, leading the officer to conclude that Rieckhoff was intoxicated. Additionally, Rieckhoff failed field sobriety tests and admitted to having consumed a pitcher and a half of beer. The police reports referenced the fact that the police initially stopped Rieckhoff for going sixteen miles over the speed limit. Rieckhoff was tested on the Intoxilyzer, yielding a test result of .17 Blood Alcohol Concentration (BAC). He pleaded no contest to an operating a motor vehicle while under the influence of an intoxicant charge and the trial court dismissed a second charge for operating a motor vehicle with a prohibited blood alcohol concentration. The trial court then found him guilty on the one count and sentenced him.

After obtaining the Intoxilyzer certifications through an open records request, Rieckhoff brought a postconviction motion for a new trial, arguing that he should be allowed to withdraw his plea because the Intoxilyzer had not been serviced within the required 120 days, thereby defeating the automatic admission of his test results. The trial court denied his request, concluding that the fact that the results would not have been automatically admissible did not merit a finding of "manifest injustice," requiring a plea withdrawal.

II. ANALYSIS.

[1] This appeal is reviewed by one judge, pursuant to § 752.31, STATS.

The trial court's decision regarding the withdrawal of a plea of guilty or no contest is discretionary and will not be upset on review unless there has been an erroneous exercise of discretion. ***State v. Spears***, 147 Wis.2d 429, 434, 433 N.W.2d 595, 598 (Ct. App. 1988). A post-sentencing motion for the withdrawal of a plea should only be granted when necessary to correct a manifest injustice. ***State v. Duychak***, 133 Wis.2d 307, 312, 395 N.W.2d 795, 798 (Ct. App. 1986). A defendant has the burden of showing by clear and convincing evidence that withdrawal of the plea is necessary to correct a manifest injustice. *See* ***State v. Schill***, 93 Wis.2d 361, 383, 286 N.W.2d 836, 847 (1980) (citation omitted). The manifest injustice test is rooted in concepts of constitutional dimension, requiring the showing of a serious flaw in the fundamental integrity of the plea. ***Libke v. State***, 60 Wis.2d 121, 128, 208 N.W.2d 331, 335 (1973).

While it is true that newly-discovered evidence may also create a "manifest injustice," and therefore require the trial court to grant the defendant's request to withdraw his plea, for newly-discovered evidence to constitute a manifest injustice, the defendant must show, at a minimum, the following criteria:

> (1) the evidence was discovered after trial; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue; (4) the evidence is not merely cumulative to the evidence presented at trial; and (5) a reasonable probability exists of a different result in a new trial.

State v. Coogan, 154 Wis.2d 387, 394-95, 453 N.W.2d 186, 188 (Ct. App. 1990).

Following Rieckhoff's no contest plea, the trial court ultimately found Rieckhoff guilty and sentenced him for the crime of operating a motor vehicle while under the influence of an intoxicant. A charge of a prohibited blood alcohol concentration was dismissed as a result of Rieckhoff's plea to the operating while under the influence of an intoxicant charge.

Rieckhoff's alleged newly-discovered evidence consisted of the fact that the Intoxilyzer machine had not been tested within 120 days. The machine's certifications, however, did confirm that when it was tested before and after the taking of Rieckhoff's test, it was in good working order. Rieckhoff argues the automatic admissibility of the test results has been compromised by the lack of a 120-day test, thereby giving him sufficient reason for him to be allowed to withdraw his plea. The fact that the State failed to comport to the requirements of § 343.305, STATS., however, does not necessarily render the test results inadmissible.

In a case that explored the admissibility of a chemical test result where there was noncompliance with the implied consent procedure, the supreme court stated, "[I]f evidence is otherwise constitutionally obtained, there is nothing in the implied consent law which renders it inadmissible in a subsequent criminal prosecution." ***State v. Zielke***, 137 Wis.2d 39, 52, 403 N.W.2d 427, 433 (1987).

Hence, it is entirely possible that, had there been a trial, the prosecutor would have been afforded the opportunity to admit the chemical test results into evidence, despite the lack of a mandated 120-day testing of the machine. Conceivably, this was more likely to occur here because the time span between certification was only five months and the machine was in good working order both before and after Rieckhoff's test, thereby potentially undermining any attacks on the validity of Rieckhoff's test result.

Further, even assuming that Rieckhoff's blood alcohol concentration results were inadmissible, it does not follow that this would be sufficient to require a plea withdrawal. Unlike a charge of operating with a prohibited blood alcohol concentration, a charge of operating while under the influence of an intoxicant can be proven without an Intoxilyzer test result.

In this case there was ample other evidence of Rieckhoff's intoxication besides the Intoxilyzer test results. The police report reflects that after Rieckhoff was stopped for speeding and failed the field sobriety tests, he was observed with bloodshot eyes, with an odor of intoxicants on his breath, and with slurred speech. Rieckhoff also admitted to having consumed a large amount of beer before being arrested. All of this incriminating evidence was in

addition to the Intoxilyzer test results which were above the legal limit for blood alcohol concentration. Had the State been unable to introduce the Intoxilyzer test results, there was additional evidence to support the operating while under the influence of an intoxicant charge. As a consequence, it is clear that Rieckhoff did not meet his burden of proof that "a reasonable probability exists of a different result in a new trial." ***Coogan***, 154 Wis.2d at 394-95, 453 N.W.2d at 188.

In sum, the trial court considered the newly-discovered evidence, applied the appropriate factors and concluded that the defendant had not met his burden of showing a manifest injustice requiring a post-sentencing withdrawal of his plea. This was a reasonable exercise of the trial court's discretion. *See* ***Spears***, 147 Wis.2d at 434, 433 N.W.2d at 598.

By the Court.—Judgment and order affirmed.

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