

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

DECEMBER 17, 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(1), 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. 96-2255-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KATHRYN L. JOHNSON,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Polk County:
JAMES A. WENDLAND, Judge. *Affirmed.*

CANE, P.J. Kathryn Johnson appeals her conviction for operating a motor vehicle while under the influence of an intoxicant, second violation. She contends that because there was a lack of foundation as to the Intoxilyzer machine's accuracy, the trial court erred by admitting its test results to the jury. The conviction is affirmed.

The State charged Johnson with OWI after police officer Ronald Bader stopped her car when observing it weave across the centerline at approximately 1:30 a.m. on March 30, 1995. Initially, Bader followed the car when observing that it had only one operable headlight. After Bader stopped the car, he detected a strong odor of alcohol coming from inside the car when

Johnson rolled down the window. Johnson admitted that she had been drinking at a party earlier. At the police station, Bader administered the Intoxilyzer test to Johnson who tested a blood alcohol content of .21%.

At a hearing on a motion to suppress the Intoxilyzer test result and again at trial, Johnson claimed that the test result was not admissible because the State had failed to show that the machine was functioning accurately on the day of her arrest. Essentially, the evidence shows that Marty Morris, a chemical test coordinator for the chemical test section of the Wisconsin State Patrol, had certified the Intoxilyzer as accurate on March 14, 1995, and then had to repair the machine on May 3, 1995, because of a failed diagnostic test. Johnson reasons that because the State provided no other evidence as to the operation of the Intoxilyzer between the date of her arrest on March 30 and the repairs on May 3, the trial court should have suppressed the Intoxilyzer results. This court is not persuaded.

By statute, a law enforcement officer who arrests a person and issues a citation for driving while under the influence of an intoxicant may request the driver to provide a breath, blood or urine sample for testing. Section 343.305(2), STATS. The results of the tests are admissible into evidence at a trial on the charge of operating a motor vehicle while under the influence. Section 343.305(5)(d) reads in pertinent part as follows:

At the trial of any civil or criminal action or proceeding arising out of the acts committed by a person alleged to have been driving or operating a motor vehicle while under the influence of an intoxicant or a controlled substance ... results of a test administered in accordance with this section are admissible on the issue of whether the person was under the influence of an intoxicant or a controlled substance. ... Test results shall be given the effect required under s. 885.235.

As noted in *City of New Berlin v. Wertz*, 105 Wis.2d 670, 674-75, 314 N.W.2d 911, 913 (Ct. App. 1981), the legislature placed no conditions on the admissibility of a breathalyzer test result. Under Wisconsin case law,

breathalyzer tests carry a prima facie presumption of accuracy, and the question of how accurately the test was performed goes to the weight to be given to the test, not to its admissibility. *Id.* at 674, 314 N.W.2d at 913.

Tests by recognized methods, such as speedometer, breathalyzer and radar, do not need to be proved for reliability in every case. *State v. Trailer Serv., Inc.*, 61 Wis.2d 400, 408, 212 N.W.2d 683, 688 (1973). These methods of measurement carry a presumption of accuracy; if the validity of basic tests had to be a matter of evidence in every instance, the administration of law would be seriously frustrated. *Id.* at 408, 212 N.W.2d at 688-89. Whether the test was properly conducted or the instruments used were in working order is a matter for the defense. *Id.* at 408, 212 N.W.2d at 688.

Here, Bader testified that the Intoxilyzer machine was functioning properly at the time he tested Johnson. The only evidence that the unit was not working properly is the trouble call to Morris approximately a week before he repaired it on May 3. This does not mean the machine was not working properly on March 30. That remained a question for the jury to decide, not a question of its admissibility.

The trial court properly admitted the test result and left the question of whether the Intoxilyzer was in proper working order for the jury to decide. Therefore, this court concludes that the trial court did not err when it admitted the results of the Intoxilyzer test. The results of the Intoxilyzer test were properly before the jury, and the denial of Johnson's motion to suppress was a proper exercise of discretion.

By the Court. – Judgment affirmed.

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