COURT OF APPEALS
DECISION
DATED AND RELEASED

May 28, 1997

NOTICE

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.

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

No. 96-2385

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

CITY OF SHEBOYGAN,

PLAINTIFF-RESPONDENT,

V.

EARL R. THILL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: JOHN B. MURPHY, Judge. *Affirmed.*

SNYDER, P.J. Earl R. Thill appeals from the trial court's denial of his motions to suppress evidence and from a judgment convicting him of operating a motor vehicle while having a prohibited blood alcohol concentration contrary to § 346.63(1)(b), STATS.[1] Thill contends that the trial court erred in

[1] A mistrial was declared on the charge of operating a motor vehicle while under the influence of an intoxicant due to a hung jury.

admitting horizontal gaze nystagmus (HGN) test evidence and in admitting the Intoxilyzer breath test results. We are not persuaded by Thill's arguments and affirm the judgment of conviction.

On March 10, 1996, City of Sheboygan Police Officer John Rupnick requested that Thill submit to field sobriety tests after stopping the vehicle Thill was operating. Thill agreed to perform field tests and Rupnick administered the HGN test, which requires the test subject to follow an object moved along a horizontal line in front of his or her eyes. Rupnick testified that there are three parts to the test for each eye and that Thill exhibited the maximum six "clues" that he might be under the influence of an intoxicant.

Rupnick next asked Thill if he had any physical problems which would prevent him from performing balancing tests. Thill replied that he had knee problems and Rupnick decided not to administer the balancing tests because of the risk of injury and the possibility that any adverse test results might be due to Thill's knee problems rather than to the use of intoxicants. Based upon his observation of Thill's driving,[2] the HGN test results and Thill's slightly slurred speech, Rupnick arrested Thill for operating a motor vehicle in violation of § 346.63(1)(a), STATS., 1993-94. Thill then consented to a breath test and a BAC result of 0.14% was obtained. Thill was issued citations for both OWI and operating with a prohibited BAC.

[2] Rupnick had observed Thill's van traveling far to the right of the centerline and testified that it moved even further to the right when cars approached from the opposite direction. When passing parked cars, the van "overcompensated" by crossing three to four feet left of the centerline.

We first address the trial court's denial of Thill's motion in limine to suppress the HGN test results. Thill does not challenge the stop of his vehicle or probable cause for his arrest but contends that the trial court erred in admitting the HGN test results into evidence at trial. Thill argues that Rupnick was not qualified to administer the HGN test or to interpret the test results and that the HGN test results in this case were unreliable.

We review a challenge to the admissibility of evidence deferentially under the erroneous exercise of discretion standard. *See* ***State v. Peters***, 192 Wis.2d 674, 685, 534 N.W.2d 867, 871 (Ct. App. 1995). We will uphold the trial court's discretionary decision if it examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *See* ***id.*** This court has acknowledged the HGN test as a standard field sobriety test in determining probable cause for arrest of intoxicated operators. *See* ***Dane County v. Sharpee***, 154 Wis.2d 515, 517, 453 N.W.2d 508, 510 (Ct. App. 1990).

At trial, Rupnick testified as to his training in administering the HGN field sobriety test,[3] as well as his test administration and observations in testing Thill. He was not asked about nor did he attempt to discuss any of the scientific principles concerning HGN testing. At the suppression hearing, the trial court noted that "this [HGN] test is subject to the same attacks of credibility that any other test would be. It's no different than any other field sobriety test." We agree.

[3] Rupnick testified, "I'm a certified Intoxilyzer operator, and part of that course involves O.W.I. detection. I also have a 24-hour training in the Horizontal Gaze Nystagmus test, standardized field sobriety testing, which also does include O.W.I. detection."

Thill relies upon ***Peters*** to show that Rupnick is not qualified to administer and interpret the HGN test results. In ***Peters***, DNA evidence was challenged as being unreliable and a DNA expert testified about the scientific background and reliability of the DNA procedure which had been used to obtain the state's DNA prosecution evidence. *See* ***Peters,*** 192 Wis.2d at 682-84, 534 N.W.2d at 870-71. Thill argues that HGN evidence, like DNA evidence, is "scientific" evidence that is admissible only if: (1) it is relevant, (2) *a witness is qualified as an expert*, and (3) the evidence will assist the trier of fact in determining an issue of fact. *See* ***id.*** at 687-88, 534 N.W.2d at 872.

Thill's argument ignores the fact that Rupnick's HGN testimony was confined to his training and observations; it was not offered as expert testimony. Unlike the DNA expert in ***Peters***, Rupnick did not testify about or discuss any of the scientific principles involved in HGN field testing. Because Rupnick's testimony was not offered as expert evidence, its admission was a proper exercise of trial court discretion. Thill was able to challenge Rupnick's testimony by cross-examination and impeachment.

Thill's contention that expert testimony is required for HGN evidence is further weakened by his concession that "[w]ith respect to the admissibility of the [HGN] field sobriety test, thousands of accused drunk drivers are subjected to HGN tests each year" and that "[a]t trial, the officers performing the tests are routinely allowed to testify regarding the administration of the test and the results." We are satisfied that properly obtained HGN evidence is

admissible as an acceptable field sobriety test procedure without the necessity of expert testimony.[4]

We now turn to Thill's objection to the automatic admissibility of the Intoxilyzer test results. Thill argues that the absence of evidence "which proved or even suggested that the simulator solution had been tested and certified within 120 days" of his breath test was a failure to comply with § 343.305(6)(b)3, STATS., and therefore the test results should be suppressed. Section 343.305(6)(b)3 requires that:

> [T]rained technicians ... test and certify the accuracy of the equipment to be used by law enforcement officers for chemical analysis of a person's breath ... before regular use of the equipment and periodically thereafter at intervals of not more than 120 days.

Thill moved for suppression of the Intoxilyzer test evidence after Rupnick had testified to the results before the jury. The trial court denied the motion. Where the correctness of a trial court's evidentiary ruling is questioned on appeal, our scope of review is limited to whether the trial court erroneously exercised its discretion. *See* ***State v. Pharr***, 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983). Furthermore, since Thill's challenge concerns the application of the certification requirements of § 343.305(6)(b)3, STATS., to the facts of this case,

[4] Thill contends that the HGN test was unreliable for a plethora of other reasons, including lack of supporting scientific research, lack of scientific agreement as to reliability, misinterpretation of test observations by untrained persons, and potential causes of nystagmus, such as ear problems, disease, medical conditions, other bodily chemicals such as caffeine and aspirin, the effects of biorhythms, and the time of day the tests were administered. Because we conclude that Wisconsin law recognizes that the HGN test is an acceptable method of obtaining probable cause evidence in OWI cases in Wisconsin, *see* ***Dane County v. Sharpee***, 154 Wis.2d 515, 517, 453 N.W.2d 508, 510 (Ct. App. 1990), we also conclude that Thill's concerns relate to the weight of the HGN evidence rather than to its admissibility.

this presents a question of law which we review de novo. *See* ***Graziano v. Town of Long Lake***, 191 Wis.2d 812, 817, 530 N.W.2d 55, 56-57 (Ct. App. 1995).

Thill's Intoxilyzer test was administered on March 10, 1996, and the simulator solution had been properly assayed on December 19, 1995. The Intoxilyzer unit used to test Thill's breath passed certification on both February 28, and March 28, 1996, within the statutory 120 days. Our supreme court has ruled that breathalyzer test results are presumed to be accurate in the absence of any meaningful challenge. *See* ***State v. Walstad***, 119 Wis.2d 483, 528, 351 N.W.2d 469, 491 (1984).

Thill argues that the simulator solution is a part of the Intoxilyzer "equipment" and must be subjected to the same certification requirement as the Intoxilyzer unit itself. Thill cites only to the statute in support of his argument. Our reading of the statute satisfies us that the simulator solution is not a part of the "equipment" used by the operator of an Intoxilyzer, but represents a separate, known solution that has been assayed to certify its quality. Each time an Intoxilyzer machine is certified, it is checked to see whether it produces an appropriate result. The December 19, 1995 assay of the simulator solution is sufficient to insure that the simulator solution is reliable for that purpose. Thill has failed to present any evidence to the contrary and we are not persuaded by his interpretation of the controlling statute.

In sum, we affirm the trial court's conclusions that the HGN test results were admissible and that the simulator solution used as a control in the Intoxilyzer test was not in violation of statutory requirements.

By the Court.—Judgment affirmed.

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