COURT OF APPEALS
DECISION
DATED AND FILED

July 11, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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

No. 99-2541

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

CITY OF MILWAUKEE,

PLAINTIFF-RESPONDENT,

V.

MICHAEL A. BELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MARY M. KUHNMUENCH, Judge. *Affirmed.*

¶1 CURLEY, J.[1] Michael A. Bell appeals the judgment convicting him of the municipal charge of operating a motor vehicle with a prohibited blood

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). Although Bell has asked that this decision be published, under WIS. STAT. § 809.23(1)(b) 4., a one-judge appeal is not eligible for publication.

alcohol concentration, contrary to WIS. STAT. § 346.63(1)(b).[2] He argues that the trial court erred by: (1) refusing to take judicial notice of his acquittal of the companion charge of operating a motor vehicle while intoxicated; (2) denying his motion that the City be prohibited from arguing that Bell was impaired at the time of the offense; (3) instructing the jury that it could infer that Bell had a prohibited alcohol content when he was driving because, at the time of his intoxilyzer test, his alcohol content was over the permissible limit; and (4) allowing the City to elicit testimony that he failed the field sobriety tests. This court affirms.

I. BACKGROUND.

¶2 On September 11, 1996, Bell and his roommate went to a bar where Bell consumed five alcoholic drinks within the span of approximately two hours. While driving home, he was stopped after a City of Milwaukee police officer claimed he saw Bell driving erratically. After Bell failed the field sobriety tests, he was arrested at approximately 9:20 p.m. He was then transported to the police station and, at approximately 10:12 p.m., he was given a test to measure his blood alcohol level. His test result registered over the permissible limit. As a result, he was given two citations, one for operating a motor vehicle while intoxicated, and another, for operating a motor vehicle with a prohibited alcohol concentration.

¶3 Bell contested the charges. He was first tried in municipal court where the judge found Bell "guilty" of operating with a prohibited alcohol concentration, but "not guilty" of operating while intoxicated. Bell then petitioned

[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

the circuit court for a *de novo* review of the charge for which he was convicted. The City did not appeal the operating while intoxicated charge.

¶4 In the circuit court, Bell brought a pre-trial motion seeking to suppress any testimony related to his performance on the field sobriety tests. He argued that any relevance of this testimony was outweighed by unfair prejudice. The motion was denied. Prior to the trial, Bell also requested that the trial court take judicial notice of the municipal judge's finding of "not guilty" of the other charge, and that the trial court tell the jury of the verdict. He also asked the trial court to rule that the City was barred from putting in evidence of his impairment, and that the City be prohibited from arguing that he was impaired on the night in question. These requests were also denied. At trial, besides testifying in his own defense, Bell called an expert witness, Robert Eberhardt, a board certified forensic toxicologist. Eberhardt testified that after applying the "blood alcohol curve's" scientific principles to the underlying facts, in his expert opinion, although Bell had a prohibited blood alcohol content at the time of the test, his alcohol content at the time of his arrest was below the legal limit. Nevertheless, Bell was convicted.

II. ANALYSIS.

¶5 Bell first contests the trial court's refusal to take judicial notice of his acquittal of the accompanying charge of operating a motor vehicle while intoxicated. He argues that his request was made under WIS. STAT. § 902.01(4) and, thus, the trial court had no choice but to take judicial notice of his acquittal in the municipal court. Bell is wrong.

¶6 WISCONSIN STAT. § 902.01 governs the circumstances and the procedure to be used when a party requests that the trial court take judicial notice. Section 902.01 reads:

> **Judicial notice of adjudicative facts. (1)** SCOPE. This section governs only judicial notice of adjudicative facts.
>
> **(2)** KINDS OF FACTS. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (a) generally known within the territorial jurisdiction of the trial court or (b) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
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> **(3)** WHEN DISCRETIONARY. A judge or court may take judicial notice, whether requested or not.
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> **(4)** WHEN MANDATORY. A judge or court shall take judicial notice if requested by a party and supplied with the necessary information.
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> **(5)** OPPORTUNITY TO BE HEARD. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.
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> **(6)** TIME OF TAKING NOTICE. Judicial notice may be taken at any stage of the proceeding.
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> **(7)** INSTRUCTING JURY. The judge shall instruct the jury to accept as established any facts judicially noticed.

Despite the language found in § 902.01(4), which suggests that the trial court is obligated to take judicial notice if a party requests and supplies the trial court with the necessary underpinnings to prove the fact to be judicially noticed, case law has long held that a trial court has discretion to decide whether to take judicial notice of a fact. *See, e.g.,* ***Fringer v. Venema***, 26 Wis. 2d 366, 372, 132 N.W.2d 565 (1965) ("[T]he trial court may in its discretion take judicial notice of facts of 'verifiable certainty' either upon its own motion or upon request of a party to the action."). Moreover, this view is consistent with other holdings because "'judicial notice' is simply a process whereby one party is relieved of the burden of producing evidence to prove a certain fact." ***State v. Watson***, 227 Wis. 2d 167, 208, 595 N.W.2d 403 (1999). Since the trial court has discretion to admit or deny evidence, ***Pophal v. Siverhus***, 168 Wis. 2d 533, 546, 484 N.W.2d 555 (Ct. App.

1992) ("[T]he admission of evidence is generally within the discretion of the trial court."), it logically follows that the trial court has discretion in the admission of judicially noticed facts. Here, the trial court determined that neither evidence of Bell's acquittal nor evidence of his conviction in the municipal court would be admitted into evidence or told to the jury. Given that the trial in the circuit court was a trial *de novo*, the trial court's decision was both reasonable and a proper exercise of discretion.

¶7 Next, this court addresses Bell's second and fourth arguments. He contends that the trial court erred in denying his motion to prohibit the City from eliciting testimony concerning his impairment at the time of his arrest. He also argues that the trial court erred in allowing the City to elicit testimony concerning his failure to satisfactorily perform the field sobriety tests. With respect to Bell's motion seeking to prohibit the City from advancing any evidence that he was impaired, Bell argues that since he was found "not guilty" of the operating while intoxicated charge, issue preclusion barred the City from submitting evidence of his impairment. The trial court found that issue preclusion did not apply. This court agrees.

¶8 "Issue preclusion requires the actual litigation of an issue which is necessary to the outcome of the first action." ***May v. Tri-County Trails Comm'n*,** 220 Wis. 2d 729, 733, 583 N.W.2d 878 (Ct. App. 1998). The determination of whether issue preclusion (also known as collateral estoppel) applies to a fact situation is a question of law that this court decides *de novo*. *See* ***id***. In this case, the application of issue preclusion is complicated by the way in which the charges of operating while intoxicated and blood alcohol concentration are treated when they arise from the identical fact situation.

> The statutes controlling OWI [operating a motor vehicle while intoxicated] and BAC [operating a motor vehicle with a prohibited blood alcohol concentration] charges make this situation unique. According to [WIS. STAT. § 346.63(1)(c)], a person may be charged with both OWI and operating with a prohibited BAC for acts arising out of the same occurrence. If both violations are charged, the offenses are joined. If the defendant "is *found guilty* of both [OWI] and [operating with a prohibited BAC] for acts arising out of the same incident or occurrence, there shall be a single conviction for purposes of sentencing." In other words, the defendant is to be sentenced on one of the charges, and the other charge is to be dismissed.

Town of Menasha v. Bastian, 178 Wis. 2d 191, 195, 503 N.W.2d 382 (Ct. App. 1993) (citations omitted). Here, both of Bell's charges were heard at the same time after which the trial court found Bell "not guilty" of the OWI charge, but "guilty" of the BAC charge. Because he was found "not guilty" of the OWI offense, Bell assumes that the trial court must have made factual determinations concerning his impairment which favor him. However, even if true, although the record is devoid of any findings of the municipal judge to support these allegations, Bell's acquittal does not qualify for issue preclusion treatment because Bell must establish that this issue of fact was actually litigated and determined by a valid and final judgment. *See* ***Hlavinka v. Blunt Ellis, and Loewi, Inc.***, 174 Wis. 2d 381, 396, 497 N.W.2d 756 (Ct. App. 1993) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 27). In other words, Bell is required to prove that the trial court made factual findings that he was not impaired. Bell cannot establish this burden because the testimony that led to his conviction of the BAC offense is the identical testimony that led to his acquittal of the OWI charge. Thus, the doctrine of issue preclusion cannot come into play under this unusual procedure where two separate charges are tried together but the trial court can only sentence a violator to one of them because the issue was not "actually" litigated earlier.

¶9 Moreover, the testimony of the officers relating to Bell's conduct and appearance at the time of the stop, during the field test and during the testing for blood alcohol, is relevant to both charges, not just the charge of OWI, as Bell contends. Bell concedes that his blood alcohol concentration at the time of the test was over that proscribed by law. His defense was that, even though his test results were in the prohibited level, he submitted proof that his blood alcohol level at the time of the offense was within a permissible range. Thus, he argued that he was "not guilty" of the charge of BAC and that the City should be prohibited from submitting any evidence except his test results. Bell is mistaken.

¶10 The City is entitled to present circumstantial evidence that refutes his contention. As the trial court noted, the evidence concerning Bell's field sobriety test performance and other observations of his demeanor and conduct are relevant evidence as to whether Bell's blood alcohol content exceeded that allowable. This is so because if Bell was showing signs of intoxication, then it was more probable that his blood alcohol content was elevated at the time of his arrest. Thus, the trial court did not err in refusing to grant Bell's pretrial motion prohibiting the City from admitting Bell's field tests.

¶11 Bell next argues that the trial court erroneously exercised its discretion in allowing testimony regarding his performance on the field sobriety tests into evidence. Bell argues that the testimony concerning his performance on the field sobriety tests was inadmissible because while relevant, the evidence's probative value was outweighed by its unfair prejudice. Relying on WIS. STAT.

§ 904.03,[3] he claims that the field test results were outweighed by the danger of unfair prejudice because the field sobriety tests are unreliable tests to detect intoxication. Consequently, much of Bell's argument attacks the trustworthiness of field sobriety tests. Like the trial court, however, this court believes the reliability of the field sobriety test results goes to the weight of the evidence—not their admissibility. Thus, the field test results were admissible and Bell was free to argue their lack of trustworthiness. Further, this court cannot find that the probative value of field test results was outweighed by the danger of unfair prejudice. The jury was entitled to consider all the relevant evidence and Bell's ability to perform the field tests was relevant. Certainly evidence that an officer believed that Bell failed the field sobriety tests was not helpful to Bell's defense, but neither was it unfairly prejudicial.

¶12 Finally, Bell argues that the trial court erred when it instructed the jury regarding the effects of his blood alcohol test results. Bell argues that the trial court erred when it failed to modify WIS JI—CRIMINAL 2668,[4] to state that blood test results were only "relevant evidence."

¶13 Bell first argues that the trial court erroneously instructed the jury that they could infer from the test results taken a short time after his arrest that his

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[3] WISCONSIN STAT. § 904.03 provides:

> **Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.** Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

[4] This is the instruction advising the jury of the elements of the offense of operating a motor vehicle while under the influence of an intoxicant/operating a motor vehicle with a prohibited alcohol concentration of 0.10%/0.10 grams or more – civil forfeiture.

BAC when he was driving would have been in the prohibited range. Bell insists that the trial court was obligated to modify the inference contained in WIS JI—CRIMINAL 2668 with language that the test results were only "relevant evidence." Bell reaches this conclusion by coupling the holding in ***State v. Vick***, 104 Wis. 2d 678, 312 N.W.2d 489 (1981), with a cautionary comment found in the committee notes to WIS JI—CRIMINAL 234.[5] First, he observes that in ***Vick***, the supreme court opined that in order for the jury instruction's permissible inference to be constitutional, there must be a rational connection between the inference and the ultimate fact. *See* ***Vick***, 104 Wis. 2d at 695. Without any evidence linking the two, the supreme court observed that the jury instruction would not survive a constitutional challenge. *See* ***id.*** at 695-96. Bell maintains that there was no rational connection here because the trial court erred in admitting evidence of his impairment. He asserts that without this evidence, the jury instruction's reference to a permissible inference is fatally flawed and the trial court erred in giving it.

¶14 He next submits that the trial court should have modified the statute along the lines suggested in the committee comments to WIS JI—CRIMINAL 234. He posits that the trial court, instead of advising the jury of the permissible inference, should have told the jury that the BAC test results were merely other relevant evidence. Without this modification, he believes the trial court erred. This court is not persuaded.

¶15 A trial court has wide discretion in issuing jury instructions based upon the facts and circumstances of the case. *See* ***State v. Pruitt***, 95 Wis. 2d 69,

[5] This instruction explains the operation of the "blood alcohol curve."

80-81, 289 N.W.2d 343 (Ct. App. 1980). Thus, the standard of review here is whether the trial court properly exercised its discretion.

¶16 This court is satisfied that the trial court properly exercised its discretion in instructing the jury. While the facts in ***Vick*** are similar to those present here, they are different in one crucial manner. Vick, too, based his defense on the "blood alcohol curve," and contending that while his test results fell within the prohibited zone, after applying the scientific principles behind the "blood alcohol curve," his alcohol concentration was not over the limit at the time of his operation. In ***Vick***, however, the trial court instructed the jury that they could conclude on the basis of the test results alone that Vick was guilty. *See* ***Vick***, 104 Wis. 2d at 685-86. Thus, unlike Bell's trial, the jury was not instructed that the BAC results could be used to infer that the results *when he was driving* would be elevated.

¶17 In affirming the verdict in ***Vick***, the supreme court determined that the trial court's attenuated instruction was merely a permissive presumption which was not unconstitutional because the state had produced evidence to support a rational connection between the presumption and the ultimate fact. *See* ***id.*** at 694-99. Like ***Vick***, here the City submitted other evidence to support its charge that Bell was operating a motor vehicle with a prohibited alcohol level which this court has already concluded was admissible. Thus, had the trial court given the same jury instruction as was given in ***Vick***, the requirement in ***Vick*** that the City prove a rational connection between the presumption and the ultimate fact would have been met. Moreover, here the trial court's instruction did not contain the anomaly present in ***Vick***. The trial court instructed the jury that the test results could only be used to infer that Bell's test results were elevated at the time of the offense.

> If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that there was .10 grams or more of alcohol in 210 liters of the defendant's breath at the time the test was taken, you may find from that fact alone that the defendant had a prohibited alcohol concentration *at the time of the alleged operating*, but you are not required to do so.

(Emphasis added.) Further, here the trial court gave a jury instruction favorable to the defense. The trial court instructed the jury that it could utilize the blood alcohol curve in its deliberations.

> Evidence has also been received as to how the body absorbs and eliminates alcohol. You may consider the evidence regarding the analysis of the breath sample and evidence of how the body absorbs and eliminates alcohol along with all the other evidence in the case, giving it just such weight as you determine it is entitled to receive.

¶18 Consequently, this court is satisfied that the trial court properly exercised its discretion with regard to the jury instructions and the trial court's refusal to modify WIS JI—CRIMINAL 2668 did not constitute clear error. Accordingly, the judgment of the trial court is affirmed.

By the Court.—Judgment affirmed.

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