COURT OF APPEALS
DECISION
DATED AND FILED

June 23, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP3352-CR **Cir. Ct. No. 2004CT363**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN D. MEINDL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County: MICHAEL J. BYRON, Judge. *Affirmed.*

¶1 DYKMAN, J.[1] John D. Meindl appeals from a judgment of conviction for operating a motor vehicle while intoxicated-fourth offense (OWI) in

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

violation of WIS. STAT. §§ 346.63(1)(a)[2] and 346.65(2)(d).[3] The trial court denied Meindl's motions to suppress evidence regarding the results of his Intoximeter and Horizontal Gaze Nystagmus (HGN) tests. Because we conclude that the trial court properly admitted Meindl's Intoximeter test results without giving them prima facie effect and did not erroneously exercise its discretion in admitting testimony on Meindl's HGN test, we affirm.

Background

¶2 On the morning of February 9, 2004, Janesville Police Officer Aaron Walz noticed John Meindl driving his vehicle erratically on Humes Road in Janesville. Walz stopped Meindl, and shortly thereafter placed him under arrest.

¶3 Walz transported Meindl to the Janesville Police Department to conduct field sobriety tests. Walz was not certified to conduct the HGN test; Janesville Police Officer Scott Katzenmeyer, who was certified, did so. In conducting Meindl's HGN test, Katzenmeyer identified all six significant indicators of intoxication. Walz wrote Katzenmeyer's observations in his report. Katzenmeyer also conducted an Intoximeter test, the result of which exceeded Meindl's limit of .02.[4]

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[2] WISCONSIN STAT. § 346.63(1)(a) reads: "(1) No person may drive or operate a motor vehicle while: (a) Under the influence of an intoxicant … which renders him or her incapable of safely driving ...."

[3] WISCONSIN STAT. § 346.65(2)(d) reads: "(2) Any person violating s. 346.63 (1) .... (d) … shall be fined not less than $600 nor more than $2,000 and imprisoned for not less than 60 days nor more than one year …."

[4] As a fourth offender, Meindl's prohibited alcohol concentration was .02 under WIS. STAT. § 340.01(46m).

¶4 At trial Meindl moved to exclude the results of his Intoximeter test, claiming that WIS. STAT. § 885.235 directs that test results administered on persons with three or more prior convictions not be given prima facie effect. The State subsequently moved to introduce expert testimony regarding the Intoximeter results. The trial court ruled that the expert testimony could not be introduced, but that the test results were admissible pursuant to WIS. STAT. § 343.305(5)(d).[5] Meindl moved to exclude Katzenmeyer's testimony regarding the HGN test, asserting that it was inadmissible hearsay evidence. The trial court denied the motion and Meindl appeals.

Discussion

¶5 Meindl argues that his Intoximeter test results were improperly admitted without expert testimony under WIS. STAT. § 885.235(1g)(c),[6] and thus

[5] WISCONSIN. STAT. § 343.305(5)(d) reads:

> 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 having a prohibited alcohol concentration … the 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 … to a degree which renders him or her incapable of safely driving … or any issue relating to the person's alcohol concentration. Test results shall be given the effect required under s. 885.235.

[6] The version of WIS. STAT. § 885.235(1g)(c) (2003-04) in effect at the time of Meindl's offense read:

(continued)

were given prima facie effect. This involves interpretation of a statute.[7] Statutory interpretation is a question of law, which we review de novo. ***County of Dane v. Winsand,*** 2004 WI App 86, ¶5, 271 Wis. 2d 786, 679 N.W.2d 885.

¶6 Under WIS. STAT. § 885.235(1g), Intoximeter tests "[are] admissible … if the sample was taken within 3 hours after the event to be proved." Katzenmeyer administered the Intoximeter test within three hours after Walz's traffic stop, meeting this requirement. The results were properly admitted pursuant to WIS. STAT. § 343.305.

¶7 Although properly admitted as evidence, we must still decide whether Intoximeter results may be given prima facie effect under the version of WIS. STAT. § 885.235(1g)(c) in effect at the time of the offense, which provided:

> In cases involving persons who have 2 or fewer prior convictions … the fact that the analysis shows that the person had an alcohol concentration of 0.08 or more is prima facie evidence that he or she was under the influence of an intoxicant and is prima facie evidence that he or she had an alcohol concentration of 0.08 or more.

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[7] WISCONSIN STAT. § 885.235 was amended by 2005 Wis. Act 8 to recreate the legal authority giving prima facie effect for test results administered on persons with three or more convictions. 2005 Wis. Act 8 reads:

> SECTION 1. 885.235 (1g) (c) of the statutes is amended to read: "885.235 (1g) (c). The fact that the analysis shows that the person had an alcohol concentration of 0.08 or more is prima facie evidence that he or she was under the influence of an intoxicant and is prima facie evidence that he or she had an alcohol concentration of 0.08 or more."

This change took effect in May 2005.

> concentration of 0.08 or more is prima facie evidence that he or she was under the influence of an intoxicant and is prima facie evidence that he or she had an alcohol concentration of 0.08 or more.

To interpret WIS. STAT. § 885.235(1g)(c), we begin with the language of the statute. ***State ex rel. Kalal v. Dane County***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. If the meaning is plain from the statutory text, then no ambiguity exists and the inquiry ends. ***Id***. A statute is ambiguous when it is capable of being understood in two or more different senses by reasonably well-informed persons. ***Id.***, ¶47. Extrinsic sources of interpretation are ordinarily consulted only to resolve an ambiguity in the statute. ***Id.***, ¶50.

¶8 The plain meaning of WIS. STAT. § 885.235(1g)(c) only provides prima facie effect for Intoximeter test results when the test has been administered to persons with two or fewer convictions. To construe the statute to give prima facie effect to all tests would render "[i]n cases involving persons who have 2 or fewer prior convictions" meaningless. Section 885.235(1g)(c). We are to attempt to give each phrase in the statute reasonable effect so that no part of the statute is superfluous. ***Lake City Corp. v. City of Mequon***, 207 Wis. 2d 155, 162, 558 N.W.2d 100 (1997). Because the statute is unambiguous, extrinsic sources of interpretation are unnecessary, and the plain meaning of the provision precludes prima facie effect for test results when the person has more than two convictions.

¶9 Meindl argues that although the test results were admissible and should not be given prima facie effect under WIS. STAT. § 885.235(1g)(c), they were given prima facie effect because they were admitted without expert testimony. This assertion stems from Meindl's reading of WIS. STAT. § 885.235(3), which provides:

> If the sample … was not taken within 3 hours after the event to be proved, evidence of the amount of alcohol in the person's blood or breath as shown by the chemical analysis is admissible only if expert testimony establishes its probative value and may be given prima facie effect only if the effect is established by expert testimony.

Meindl does not explain why this provision is applicable to his case. A plain reading of the provision indicates that it is applicable only when the test results are inadmissible under § 885.235(1g). Meindl's test was taken within three hours of his driving, and therefore § 885.235(3) is inapplicable to this case. Admitting Meindl's test results without expert testimony did not give the results prima facie effect.

¶10 Meindl also asserts that the trial court improperly admitted hearsay evidence regarding the results of the HGN test Katzenmeyer administered. Both parties agree that this is hearsay evidence. However, Meindl argues that because Katzenmeyer did not write the report on the HGN test and because Walz, who was not certified to perform the HGN test, wrote the report, Katzenmeyer's testimony was hearsay evidence. The State argues that the testimony was admissible as an exception to the hearsay rule under WIS. STAT. § 908.03. A trial court's decision to admit hearsay evidence is discretionary, and we will not reverse unless the ruling was manifestly wrong and an erroneous exercise of discretion. ***State v. Ballos***, 230 Wis. 2d 495, 504, 602 N.W.2d 117 (Ct. App. 1999). "'To be invested with discretion means that the trial judge has what might be termed a limited right to be wrong in the view of the appellate court, without incurring reversal.'" M. Rosenberg. APPELLATE REVIEW OF TRIAL COURT DISCRETION, 79 FRD 173, 176 (1979) (quoted in ***State v. McConnohie***, 113 Wis. 2d 362, 370, 334 N.W.2d 903 (1983)).

¶11 The trial court's decision was not an erroneous exercise of discretion because it was within the trial court's discretion to admit the testimony as a recorded recollection pursuant to WIS. STAT. § 908.03(5).[8] For hearsay evidence to avoid the hearsay rule under § 908.03(5), the recorded recollection must concern a matter about which the "witness once had knowledge," and must "have been made when the matter was fresh in the witness's memory." Section 908.03(5). Katzenmeyer testified that although he could not recollect the results of Meindl's HGN test at the time of trial, he had knowledge of the test results at the time the record was made. That Katzenmeyer did not write the report does not preclude this evidence from meeting the requirements of § 908.03(5) because a record that accurately reflects what a witness once knew but no longer remembers need not have been personally prepared by that witness to be admissible under 908.03(5). ***State v. Jenkins***, 168 Wis. 2d 175, 189, 483 N.W.2d 262 (Ct. App. 1992).

¶12 Meindl also argues that the testimony is not a proper recorded recollection because Walz was not certified to administer the HGN test and thus should not have written the report. We disagree. Walz merely recorded Katzenmeyer's observations and did not administer any part of the HGN test. His lack of certification is irrelevant to Katzenmeyer's recorded recollection of Meindl's HGN test. Therefore, we conclude that it was within the trial court's discretion to admit Katzenmeyer's testimony as a recorded recollection pursuant to WIS. STAT. § 908.03(5).

[8] Under WIS. STAT. § 908.03(5), a recorded recollection is: "A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made when the matter was fresh in the witness memory and to reflect that knowledge correctly."

¶13 Meindl argues in his reply brief that admission of Katzenmeyer's testimony violated his constitutional right to cross-examine Katzenmeyer under U.S. CONST. amend. VI[9] and WIS. CONST. art. I, § 7.[10] We normally do not review arguments raised for the first time in a reply brief. ***Sisters of St. Mary v. AAER Sprayed Insulation***, 151 Wis. 2d 708, 723 n.4, 445 N.W.2d 723 (Ct. App. 1989). We follow that rule here.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.

[9] UNITED STATES CONST. amend. VI reads: "In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him …."

[10] WISCONSIN CONST. art. I, § 7 reads: "In all criminal prosecutions the accused shall enjoy the right … to meet the witnesses face to face …."