

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**June 13, 2006**

Cornelia G. Clark  
Clerk of Court of Appeals

**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.

**Appeal No. 2005AP2648**

**Cir. Ct. No. 2005TR460**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-APPELLANT,**

**V.**

**MARK JOSEPH KOVACH,**

**DEFENDANT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Forest County:  
ROBERT A. KENNEDY, JR., Judge. *Reversed and cause remanded with  
directions.*

¶1 PETERSON, J.<sup>1</sup> The State appeals a judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration, first offense,

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

contending the circuit court failed to impose the applicable penalties. We reverse and remand, directing the circuit court enter a judgment consistent with the law.

¶2 At a court trial, the State presented evidence of a breath test indicating Kovach's blood alcohol concentration (BAC) was .11%. The applicable prohibited alcohol concentration was .08%. *See* WIS. STAT. § 340.01(46m)(a). Kovach did not contest the test result, but instead testified about the circumstances surrounding the violation.

¶3 The court found Kovach guilty and proceeded to sentencing, expressing its intent to impose the minimum penalty. After some confusion about the minimum penalty, the court discovered that if Kovach had a BAC of less than .10%, he would not have to pay a driver improvement surcharge, since this was his first offense. *See* WIS. STAT. § 346.655(1).<sup>2</sup>

¶4 The court then wrestled with how it might find Kovach's BAC to be less than .10%. It eventually determined, without any evidence in the record, that the breath test had a "tolerance" of .01% and that Kovach's BAC could have changed during the hour between his arrest and the test. The court then found that Kovach had a BAC of less than .10%.

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<sup>2</sup> WISCONSIN STAT. § 346.655(1) states:

If a court imposes a fine or forfeiture for a violation of s. 346.63(1) or (5), except for a first violation of s. 346.63(1)(b), if the person who committed the violation had a blood alcohol concentration of 0.08 or more but less than 0.1 at the time of the violation, ... it shall impose a driver improvement surcharge under ch. 814 in an amount of \$355 in addition to the fine or forfeiture, plus costs, fees, and other surcharges imposed under ch. 814.

¶5 On appeal, the State argues there was no evidence to support the court's rejection of the breath test result. It also argues that the "facts" upon which the court relied to reject the test result were not appropriate for judicial notice. We agree with both of these arguments.

¶6 The Wisconsin statutes authorize and regulate several types of chemical tests, which are entitled to a prima facie presumption of accuracy. *See* WIS. STAT. § 343.305(6); *State v. Disch*, 119 Wis. 2d 461, 475, 351 N.W.2d 492 (1984). Kovach did not attempt to challenge the accuracy of his breath test, and the court did not suggest the test result was inconsistent with any other evidence. Nor did the court, before sentencing, give any indication that it believed the test result was inaccurate. Instead, the only apparent motive for rejecting the test result was to obtain a lesser penalty for Kovach. Regardless, the presumed accuracy of the breath test was not rebutted.

¶7 Further, the court was not entitled to take judicial notice of the supposed inaccuracy of the breath test. To be subject to judicial notice, a fact must not be subject to reasonable dispute. WIS. STAT. § 902.01(2). The "facts" relied upon here were not only subject to reasonable dispute, but were also contrary to the presumptive accuracy of chemical tests. *See State v. Busch*, 217 Wis. 2d 429, 442, 576 N.W.2d 904 (1998). Before the court could rely on the "tolerance" of the breath test or the effects of conducting the test an hour after Kovach's arrest, the court would have to receive evidence on those points. Without any evidence, the court's finding that Kovach's BAC was less than .10% was erroneous. On remand, the circuit court shall enter a judgment imposing the fines, assessments, and costs prescribed by the statutes.

*By the Court.*—Judgment reversed and cause remanded with directions.

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

