COURT OF APPEALS
DECISION
DATED AND FILED

March 29, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1547

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

CITY OF LAKE MILLS,

PLAINTIFF-RESPONDENT,

V.

ALTON D. BEHLKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jefferson County: RANDY R. KOSCHNICK, Judge. *Affirmed.*

¶1 VERGERONT, J.[1] Alton Behlke appeals the judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration in

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

violation of WIS. STAT. § 346.63(1). He challenges the trial court's ruling that the intoxilyzer test results were entitled to the statutory presumption of reliability and accuracy, and its ruling permitting an expert to render an opinion on whether there were interferents[2] involved in Behlke's test results. We conclude the trial court did not erroneously exercise its discretion on either point and we therefore affirm.

BACKGROUND

¶2 Behlke was charged with operating while under the influence of an intoxicant (OWI) and operating with a prohibited alcohol concentration (PAC) after being stopped while operating his motorcycle late at night on May 30, 1998.[3] The basis for the PAC charge was the analysis of a sample of his breath by an Intoxilyzer Model 5000 6400 Series which produced a reading of .160. After being convicted on both charges in municipal court, Behlke requested a jury trial in circuit court. He moved to suppress the breath test results on the ground that, due to major changes in the operating software, the machine was not certified for use on May 31, 1998,[4] as required by WIS. STAT. § 343.305(6)(b)[5] and therefore it was not entitled to a presumption of reliability and accuracy.

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[2] According to the evidence presented at trial, an interferent is a chemical compound that is not alcohol but which the testing instrument reads as alcohol.

[3] Since Behlke was acquitted on the OWI charge, we summarize only the pretrial proceedings and trial evidence relating to the PAC charge and the issues on this appeal.

[4] The test on a sample of Behlke's breath took place early in the morning of May 31, 1998.

[5] WISCONSIN STAT. § 343.305(6) states in relevant part:

> (b) The department of transportation shall approve techniques or methods of performing chemical analysis of the breath and shall:

(continued)

¶3 At the hearing on the motion, Behlke presented the testimony of George Menart, senior electronics technician in the Chemical Test Section of the Department of Transportation (DOT), Division of State Patrol.[6] Menart was the

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> 1. Approve training manuals and courses throughout the state for the training of law enforcement officers in the chemical analysis of a person's breath;
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> 2. Certify the qualifications and competence of individuals to conduct the analysis;
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> 3. Have trained technicians, approved by the secretary, 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….
>
> (c) For purposes of this section, if a breath test is administered using an infrared breath-testing instrument:
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> 1. The test shall consist of analyses in the following sequence: one adequate breath sample analysis, one calibration standard analysis, and a 2nd, adequate breath sample analysis.
>
> 2. A sample is adequate if the instrument analyzes the sample and does not indicate the sample is deficient.
>
> 3. Failure of a person to provide 2 separate, adequate breath samples in the proper sequence constitutes a refusal.
>
> (d) The department of transportation may promulgate rules pertaining to the calibration and testing of preliminary breath screening test devices.

WISCONSIN STAT. § 343.305(5)(d) provides that the results of tests administered in accordance with this section are admissible on any issue relating to the person's alcohol concentration and are given the effect required under WIS. STAT. § 885.235. If the sample is taken within three hours of the event to be proved, a chemical analysis showing an alcohol concentration of 0.1 or more is prima facie evidence that the subject had a PAC of 0.1 or more, without requiring expert testimony to this effect. Section 885.235(1g)(c).

There is no issue on appeal concerning the periodic 120 day maintenance certification.

[6] George Menart's testimony was actually taken at the hearing on a suppression motion in another case pending before the same court, ***City of Fort Atkinson v. Trish A. Jonas***, Case No. 00-CV-007, Jefferson County Circuit Court. By stipulation of the parties, this testimony became part of the record in this case.

expert who testified in ***State v. Busch***, 217 Wis. 2d 429, 576 N.W.2d 904 (1998). In ***Busch***, the supreme court held that the trial court did not erroneously exercise its discretion in determining that the Intoxilyzer Model 5000 6400 Series and the 6600 Series were essentially the same machine due to their identical analytical processing. The court also held that DOT's interpretation that the method of testing the 6600 Series had been previously evaluated and approved is consistent with WIS. STAT. § 343.305(6)(b) and WIS. ADMIN. CODE § TRANS 311.04. The court therefore concluded that the result obtained by the 6600 Series in analyzing Busch's breath sample was entitled to a presumption of reliability and accuracy, since a machine "identical in analytical functioning has already been tested, evaluated and approved for use in this state." ***Id.*** at 435.

¶4 In this case, Behlke attempted to establish through Menart's testimony that there had been revisions to the software in the 6400 Series since that series was originally certified in 1983/84, and the revisions were significant enough to warrant another evaluation and certification of the 6400 Series before the test results were entitled to a presumption of reliability and accuracy. Menart testified there were twenty-two revisions to the software, with revision twenty-two, the last one, put in place in 1996. There was no formal recertification done in conjunction with any of these changes. However, there was a reevaluation of sample machines of the 6400 Series and 6600 Series conducted in July 1997, which included all the software revisions.[7]

[7] This 1997 reevaluation was not part of the record in ***State v. Busch***, 217 Wis. 2d 429, 576 N.W.2d 904 (1998), because it was conducted after the court of appeals decision in that case. The court of appeals decision had reversed the trial court's determination that the evaluation and certification done on the 6400 Series was sufficient for the 6600 Series; the court of appeals concluded that the latter was a new breath-testing instrument. ***Id.*** at 434. However, the supreme court reversed the decision of the court of appeals. ***Id.*** at 433-35.

¶5 In response to questions from the court, Menart testified that the 6400 Series remained analytically the same in the same sense that phrase was used in ***Busch*** in spite of the software changes, because the software changes to the 6400 Series did not affect the analytical processing of the machine. He also testified that the 1997 reevaluation verified that the machine was precise and accurate and had the necessary qualities to insure specificity. In Menart's opinion, the 6400 machine used in this case was subject to a proper legal recertifcation in July 1997.

¶6 The court accepted Menart's testimony, including his professional opinions. Based on his testimony, the court found the software changes had not affected the machine's analytical processing, the machine's analytical processing had not changed since the machine was certified, the machine was approved as required by WIS. STAT. § 343.305(6)(b) and WIS. ADMIN. CODE § TRANS 311.04, and the machine was entitled to a presumption of reliability and accuracy. The court therefore denied Behlke's motion.

¶7 After the court denied the motion, the issue arose as to what evidence Behlke would be able to present to challenge his particular test results. Based on a portion of Menart's testimony that had addressed the 1997 reevaluation with respect to the machine's ability to distinguish other chemical compounds from alcohol, Behlke's counsel stated he intended to prove Behlke was exposed to chemicals in his work that would interfere with the proper functioning of the machine. The court agreed Behlke could challenge the presumption of reliability of the results in this case, subject to a proper foundation. Specifically, the court stated Behlke would need to establish that compounds were at least likely present on his person or breath at the time the sample of his breath was analyzed and that these compounds could reasonably lead to an improper analysis by the machine.

¶8 At the trial the State presented Menart, who testified that the test results on the ticket produced from Behlke's breath samples "are outstanding." He explained that there were two test results separated in time by about a minute and a half to two minutes with identical results of .160 grams per 210 liters, the proper zero baseline reflecting a lack of contaminants in the air of the room before the first test ("air blank"), the proper air blank, calibration check and another air blank after the first test and before the second test, and a final air blank. Menart also explained that some other compounds could be read as alcohol; the machine was designed to detect some of those, most particularly acetone, flag it as an "interferent," and subtract out the interferent so that it did not add to the standard .10 solution used in the analysis. When a ticket is produced that flags an interferent, the machine operator is trained to take the individual to the hospital for a blood test. When asked whether there was any interferent that the machine did not flag in analyzing Behlke's breath sample, Menart opined, without objection, that, based on his experience in working with this machine, regarding the test results from Behlke "we're looking at nothing but alcohol."

¶9 On cross-examination, Behlke's counsel elicited from Menart testimony about the testing of certain compounds that were potential interferents both in the evaluation done in 1983/84 for the original certification and in the 1997 reevaluation. Menart testified that the chemist selected common chemicals that are in daily use that could be read as alcohol; among others, mineral spirits as vapor in room air was tested in the 1983/84 evaluation and toluene and xylene were tested then and retested in 1997. Menart agreed that these are petroleum distillates used as solvents. He also agreed that the lab records from the testing of toluene and xylene in 1997 showed that with certain concentrations of those compounds, the compounds were added on to the standard .10 solution, were

reported as alcohol, and were not flagged as an interferent. However, he pointed out that the rapidly declining results over the five tests for each of the two compounds indicated that a very volatile compound was mixed with the alcohol. He agreed the lab records from the 1997 evaluation showed that at a certain concentration, acetone was flagged as an interferent in only one out of five tests, although he pointed out that it was subtracted from the standard solution and so it did not show up as alcohol.

¶10 On redirect, the prosecutor asked Menart whether, given the discussion of toluene and other solvents, he had an opinion whether it was reasonable that there would have been interferents involved in the testing of Behlke's breath sample. Behlke's counsel objected based on foundation and the court overruled the objection. Menart responded:

> The test results, as indicated on this Intoxilyzer test result, are perfect. I have two tests that are separated by approximately two minutes (displaying document for the Jury). And there's no indication that any interferent was present. The standard .101 was where it was supposed to be. And it's my opinion that that is a very good test result.

¶11 Behlke testified he is self-employed as a motorcycle mechanic and worked in his shop until approximately 6:00 p.m. on May 30, 1998. As part of his work, he uses a solvent tank to wash parts, and the solvent is mineral spirits. He does not wear gloves when using the solvent and sometimes uses the solvent directly to clean his hands.

¶12 The jury acquitted Behlke on the OWI charge, but found him guilty on the PAC charge. On appeal, Behlke challenges the presumption of reliability and accuracy accorded the test results of his breath on the ground that the 1997 recertifcation of the Intoxilyzer 5000 6400 Series was deficient because software

changes did affect the analytical process and because the reevaluation showed the machine could not distinguish between alcohol and other substances. He also challenges the trial court's ruling on his foundation objection to Menart's opinion on whether there were interferents involved in the testing of his breath samples.

DISCUSSION

¶13 We consider first Behlke's challenge to the trial court's ruling that the test results of his breath samples were entitled to a presumption of reliability and accuracy. The admission or exclusion of evidence is a discretionary determination, which we do not reverse if there is a reasonable factual basis in the record for the trial court's determination and the ruling was based on a correct application of the law. ***State v. Oberlander***, 149 Wis. 2d 132, 140-41, 438 N.W.2d 580 (1989). We conclude the trial court had a reasonable factual basis and its ruling was based on a correct application of the law.

¶14 The legislature in WIS. STAT. § 343.305(6)(b) has delegated to DOT the authority and responsibility for evaluating and approving the equipment used to perform a chemical analysis of a person's breath, and, in accordance with that delegation, DOT has promulgated rules for evaluating and approving that equipment. WIS. ADMIN. CODE § TRANS 311.04.[8] ***Busch***, 217 Wis. 2d at 442.

[8] WISCONSIN ADMIN. CODE § TRANS 311.04 states in relevant part:

> Approval of breath alcohol test instruments. (1) Only instruments and ancillary equipment approved by the chief of the chemical test section may be used for the qualitative or quantitative analysis of alcohol in the breath.
>
> (2)(a) All models of breath testing instruments and ancillary equipment used shall be evaluated by the chief of the chemical test section.

(continued)

When a machine's method of testing has been recognized as accurate and complies with WIS. STAT. §§ 343.305(6)(b) and 311.04, it is afforded a presumption that the test results are accurate and reliable. ***Busch***, 217 Wis. 2d at 443. The presumption of reliability and accuracy allows the results of the test to be admitted without foundational testimony regarding the machine's scientific reliability and accuracy. ***State v. Dwinell***, 119 Wis. 2d 305, 310, 349 N.W.2d 739 (Ct. App. 1984).

¶15 Behlke's first contention is that ***Busch*** dealt only with hardware changes—that is, the optical bench—and not with software changes that affect the manner in which the signals produced by the optical bench are processed to produce the test card. That is true. However, Menart testified that the Intoxilyzer 5000 6400 Series was reevaluated in 1997 for accuracy, precision and specificity, after all the revisions to the software had been made, and it was recertified as accurate. Under WIS. ADMIN. CODE § TRANS 311.04, DOT is given the authority to determine the procedure for evaluating all models. ***Busch***, 217 Wis. 2d at 445. Behlke contends the recertification is flawed because DOT did not adequately evaluate the software changes, but Menart testified that in his opinion the reevaluation took the software changes into account and the recertification was proper. The trial court as the finder of fact was entitled to accept Menart's testimony, which it did.

¶16 Behlke also appears to argue that DOT should have done a specific reevaluation of the machine each time software revisions were made. However,

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> (b) The procedure for evaluation shall be determined by the chief of the chemical test section.
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> (3) Each type or category of instrument shall be approved by the chief of the chemical test section prior to use in this state.

since Menart testified the 1997 reevaluation was conducted after all the software revisions had taken place, and since that reevaluation was before the test of Behlke's breath sample occurred, we fail to see the relevance of the lack of reevaluations before 1997. In any event, Menart testified that the software revisions did not change the analytical processing of the machine, just as the hardware changes in the 6600 Series as compared to the hardware in the 6400 Series, at issue in ***Busch***, did not change the analytical processing of the machine. Menart's testimony provided a sufficient factual basis on which the court could find that the 1997 recertification of the Intoxilyzer 5000 6400 Series adequately evaluated the software changes and properly recertified the machine notwithstanding those changes.

¶17 Behlke also challenges the recertification because the reevaluation in 1997 showed that the 6400 Series did not distinguish certain compounds from alcohol. Behlke did not assert this as a ground in his motion in limine, although he mentioned it in his argument to the court after Menart's testimony on the motion. Menart acknowledged in that testimony that in some instances in the 1997 reevaluation, the machine did not flag interferents. However, there was no evidence the instances referred to were significant in terms of the reliability, accuracy, and specificity of the machine. Therefore, in spite of that testimony, the court could rely on Menart's testimony that the 1997 reevaluation tested accuracy, precision, and specificity and, that in his opinion, the recertification, based on that reevaluation, was proper.[9]

[9] Although Behlke presented additional testimony at trial on the testing in 1983/84 and in 1997 on potential interferents, he does not cite anywhere in the record that he asked the court to rule again on the statutory presumption in light of this additional testimony. As we understand his argument, he is not contending the trial court should have denied the statutory presumption based on the testimony he presented at trial.

¶18 We next address Behlke's challenge to the trial court's overruling of his foundation objection when the prosecutor, on redirect, asked Menart whether there was an interferent involved in the test of Behlke's breath sample. Behlke contends Menart did not have the experience necessary to answer this question, and he points in support to Menart's testimony at the hearing on the motion:

> Q. So even though precision and accuracy in your opinion were the same, do you have an opinion as to whether the fact that the machine would sometimes read these other substances as alcohol was better or worse than the original certification of the machine back in '84?
>
> A. Without having the results from the original testing I couldn't even render an opinion on that.
>
> Q. And that's to some extend outside your area of expertise?
>
> A. Yes, the chemistry work was generally done either by Pat Harding from the State Hygiene Lab or Mary McMurry when she worked for us as our chemist.

¶19 The decision whether a witness has adequate expertise by virtue of knowledge, skill, experience, training, or education to render an expert opinion is within the trial court's discretion. *See* ***State v. Hollingsworth***, 160 Wis. 2d 883, 895, 467 N.W.2d 555 (Ct. App. 1991). In this case, Behlke's counsel questioned Menart extensively at trial on the tests done in 1983/84 and 1997 on potential interferents, based on the records of those results, in an attempt to prove the Intoxilyzer 5000 6400 Series did not adequately distinguish certain compounds from alcohol. The application of those test results to the testing of Behlke's breath sample is simply another step in the line of questioning initiated by Behlke's counsel. Indeed, on direct examination Menart had given, without objection by Behlke's counsel, the same answer to the same question that Behlke's counsel objected to on redirect.

¶20 Given Menart's testimony of his involvement in the original evaluation of the 6400 Series in 1983/84 and reevaluation in 1997, and his testimony on his experience working with this model, the court had ample basis on which to conclude that he had sufficient expertise to give an opinion in response to the question objected to. The testimony that Behlke cites from the motion hearing shows only that Menart could not give an opinion comparing the 1983/84 results regarding the potential interferents with those from 1997 without having the former results in front of him, in addition to the latter results. The quoted portion also shows the obvious—that Menart is not a chemist. However, Behlke has not established Menart needed to be a chemist in order to have the expertise to answer the prosecutor's question. Indeed, Behlke's counsel's comments to the court at the end of the motion hearing indicate he believed Menart had the expertise to testify on the machine's ability to read and flag interferents. In response to the court's statement on the foundation required in order for Behlke to present evidence that compounds could interfere with the functioning of the machine, Behlke's counsel stated:

> Mr. Menart's testimony clearly establishes that. And I believe that he has a basis knowledge that his can be expanded on, both on direct and cross, at trial. He's not a chemist, but he is, in fact, aware of the specific testing that was done. He was reading from the lab books at the last hearing … I believe that Mr. Menart would be able to lay the basic foundation–would concede that it's the specific bond that's very common, which is what the machine is reading. The interferent testing is designed to flag those things, and that's what he testified is inconsistent.

¶21 Behlke also argues Menart's opinion was "misleading" because he could not know if there were interferents involved if the machine did not flag them. However, this goes to the weight the fact finder may choose to give to Menart's opinion and not to its admissibility.

¶22 We conclude the trial court did not erroneously exercise its discretion in overruling the objection and permitting Menart to answer the question.

By the Court.—Judgment affirmed.

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