**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**February 7, 2007**

**A. John Voelker**
**Acting Clerk of Court of Appeals**



**Appeal No. 2006AP1748-CR** **Cir. Ct. No. 2005CM201**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JAMES M. SWEENEY,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Washington County: PATRICK J. FARAGHER, Judge. *Affirmed.*

¶1 NETTESHEIM, J.[1] James M. Sweeney appeals from a judgment convicting him of operating a motor vehicle while intoxicated (OWI), second offense. The State lost the statutory presumption of admissibility of the breath test result due to a violation of WIS. STAT. § 343.305, the implied consent law. Sweeney then moved in limine to bar any evidence of the test result. Following a pretrial evidentiary hearing at which the State's expert witness testified, the trial court denied Sweeney's motion on grounds that, in Wisconsin, admissibility of scientific evidence is a function of relevancy, not credibility or reliability. We agree and affirm.

¶2 At approximately 2:20 a.m. on December 19, 2004, City of Hartford Police Officer Patrick Beine stopped Sweeney. Beine detected a strong odor of intoxicants and observed that Sweeney's eyes were bloodshot and glassy and that he had poor balance and swayed back and forth. Sweeney's field sobriety test performance led Beine to conclude that Sweeney was intoxicated An intoximeter test administered at 3:49 a.m. revealed a prohibited alcohol concentration (PAC) of 0.17 percent. Sweeney was charged with OWI and PAC, both second offenses.

¶3 Sweeney challenged the presumptive admissibility of the breath test results afforded by the implied consent law because the officer misinformed him as to certain provisions of that law. He also moved for suppression of the test results on grounds that his right to an additional test was "frustrate[ed] and/or den[ied]." The trial court agreed and granted the motion precluding the State from relying on the statutory presumption.

[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.

¶4 Sweeney then filed a motion in limine requesting total suppression of the breath test result. The trial court heard the motion on the morning of the scheduled jury trial. At the hearing, the State presented the testimony of Barbara Doyle, its expert. Sweeney did not challenge Doyle's qualification and expertise for purposes of the hearing. Doyle testified that she had considered the information in the police report, the time of the stop, the time of the breath test, and Sweeney's gender, elimination rate and his height and weight. She acknowledged that she did not have information about when Sweeney had last consumed food or drink.

¶5 Through a process called retrograde extrapolation, Doyle used the 0.17 breath test result obtained at 3:49 a.m. to calculate Sweeney's BAC when he was stopped at 2:20 a.m. Doyle opined that Sweeney's BAC at the time of the stop would have been either: (1) below 0.08 if he had had six to seven drinks immediately prearrest, such that the drinks were unabsorbed when he took the breath test, or (2) approximately 0.19 if he was "postabsorbative," i.e., had consumed the alcohol sometime earlier such that the alcohol already was in his system.

¶6 In his argument for suppression of Doyle's testimony at the trial, Sweeney presented the trial court with a Texas decision factually similar to his own. ***Mata v. Texas***, 46 S.W.3d 902 (Tex. Crim. App. 2001), *overruled on other grounds*, ***Bagheri v. Texas***, 87 S.W.3d 657 (Tex. Crim. App. 2002). Mata was stopped for a traffic violation in the early morning hours and the police officer smelled alcohol on Mata's breath. ***Mata***, 46 S.W.3d at 904. Sobriety tests were administered and Mata was arrested. ***Id.*** Two hours later, Mata's breath alcohol level was 0.19, leading to a charge of driving with a BAC in excess of 0.10. ***Id.*** As in this case, the prosecution sought to use an expert who used retrograde

extrapolation to establish Mata's BAC. Mata responded with a motion to suppress, contending that the science of retrograde extrapolation was not satisfactorily reliable and relevant. ***Id.*** As here, the expert there did not know Mata's drinking history and rendered different opinions reflecting alternate scenarios. ***Id.*** at 905-06. The trial court denied the suppression motion, the court of appeals affirmed, and the court of criminal appeals granted discretionary review. ***Id.*** at 907. The court of criminal appeals reversed, holding that the use of retrograde extrapolation without complete data was speculative and thus not reliable. *See* ***id.*** at 915-16.

¶7 Relying on ***Mata***, Sweeney argued that Doyle's lack of knowledge as to the time of his alcohol consumption was a foundational deficiency that precluded Doyle's opinion testimony.

¶8 The trial court here discounted ***Mata***, ruling that suppression was not the remedy for a foundational deficiency. Rather, the court stated "the classic way it's done in Wisconsin" is to point out the foundational deficiency via cross-examination in an attempt to undermine the expert's opinion. After a brief recess, the court explained its rationale in greater detail, reciting at length from ***State v. Peters,*** 192 Wis. 2d 674, 534 N.W.2d 867 (Ct. App. 1995), which details Wisconsin's approach to the admission of scientific testimony or evidence. *See* ***id.*** at 687-88. The court explained that a Wisconsin trial court is limited to a determination of relevancy, leaving credibility or reliability as matters to be explored on cross-examination and determined by the jury. Following this ruling, Sweeney opted to waive the jury trial and enter a plea of no contest.

¶9 Thereafter, the trial court issued a supplemental written decision further distinguishing ***Mata***, and noting that Texas had adopted the ***Daubert***[2] rule and codified it in its own rules of criminal procedure. The court held that, besides being from another jurisdiction, ***Mata*** was not persuasive authority because it "[arose] in a ***Daubert*** state" and focused on reliability of the proffered evidence as a precursor to admissibility. *See* ***Mata***, 46 S.W.3d at 910 (stating that the court's only concern was "whether [the expert] reliably applied the science of retrograde extrapolation in [the defendant's] trial"). The court reiterated that relevance, not reliability, is the proper focus in Wisconsin for admissibility under Wis. Stat. § 907.02. Sweeney appeals.

DISCUSSION

¶10 The parties do not dispute that the police officer's failure to substantially comply with the implied consent law cost the State presumptive admissibility of the breath test results Neither the statute nor its history permits the conclusion, however, that such a failure requires per se suppression of legally obtained chemical evidence. *See* ***State v. Piddington***, 2001 WI 24, ¶34, 241 Wis. 2d 754, 623 N.W.2d 528. The issue is whether Doyle's expert testimony satisfied the test of relevancy as to Sweeney's BAC at the time of his driving. If so, the testimony was admissible. If not, the testimony was inadmissible.

¶11 We review a challenge to the admissibility of evidence deferentially under the erroneous exercise of discretion standard. ***Peters***, 192 Wis. 2d at 685. Part of the court's exercise of discretion includes determining whether the

[2] ***Daubert v. Merrill-Dow Pharmaceuticals, Inc.***, 509 U.S. 579 (1993). *See infra* ¶12.

evidence is relevant under WIS. STAT. § 904.02. *See* ***State v. Gribble***, 2001 WI App 227, ¶55, 248 Wis. 2d 409, 636 N.W.2d 488. We uphold the trial court's discretionary decision if the court examined the pertinent facts, applied the proper legal standard and, using a demonstrated rational process, reached a conclusion a reasonable judge could reach. ***Peters***, 192 Wis. 2d at 685.

¶12 As the trial court rightly noted, ***Peters*** outlines the admissibility of scientific evidence in Wisconsin. Wisconsin's approach must be viewed against the backdrop of ***Frye v. United States***, 293 F. 1013 (D.C. Cir. 1923), and ***Daubert v. Merrill-Dow Pharmaceuticals, Inc.***, 509 U.S. 579 (1993). In ***Frye***, the admission of scientific evidence was conditioned upon whether the underlying scientific principle had achieved "general acceptance in the particular field to which it belongs." ***Frye***, 293 F. at 1014. Seventy years later, the United States Supreme Court held in ***Daubert*** that the Federal Rules of Evidence superseded the ***Frye*** test. ***Daubert***, 509 U.S. at 587. While ***Daubert*** did not entirely abandon ***Frye***'s "general acceptance" test, it held that under FED. R. EVID. 702[3] the trial judge must assume a "gatekeeping role" to ensure that the evidence is both relevant and reliable. ***Daubert***, 509 U.S. at 589 & n.7, 596.

¶13 In Wisconsin, however, the admissibility of scientific testimony or evidence does not depend on its reliability. ***Peters***, 192 Wis. 2d at 688. Wisconsin "clearly and unequivocally repudiated" ***Frye*** in favor of the relevancy test over three decades ago in ***Watson v. State***, 64 Wis. 2d 264, 273-74, 219

[3] FEDERAL R. EVID. 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." This language mirrors WIS. STAT. § 907.02.

N.W.2d 398 (1974). ***State v. Walstad***, 119 Wis. 2d 483, 519, 351 N.W.2d 469 (1984). Our standard for the admission of scientific evidence therefore was unaffected by ***Daubert***. ***Peters***, 192 Wis. 2d at 687. Evidence generally will be admitted if it is relevant, if the witness is qualified as an expert and if the evidence will assist the trier of fact in determining an issue of fact. ***Id.*** at 687-88. Relevant scientific evidence is admissible in Wisconsin "regardless of the scientific principle that underlies the evidence." ***Id.*** at 688. Whether that evidence or testimony is accepted or believed "is a question of credibility for the finder of fact, but it clearly is admissible." ***Id.*** at 688 (citation omitted).

¶14 As he did in the trial court, Sweeney endeavors to convince us that his argument is not based on the reliability of Doyle's method. Instead, he argues, because the record is silent as to his drinking history, which we assume encompasses how much, how long and when he drank, as well as his overall drinking habits, Doyle's retrograde extrapolation opinions are not supported by the record. We are unpersuaded. Evidence is relevant if it makes a fact that is of consequence to the determination of the action more or less probable. WIS. STAT. § 904.01. "Once the relevanc[e] of evidence is established and the witness is qualified as an expert, the reliability of the evidence is a weight and credibility issue for the fact finder and any reliability challenges must be made through cross-examination or by other means of impeachment." ***Peters***, 192 Wis. 2d at 690.

¶15 Those bases were covered here. Sweeney does not challenge Doyle's qualifications, and the trial court ruled that the qualitative breath test result was relevant. Doyle opined that one of two drinking scenarios could have caused Sweeney to exhibit a 0.17 an hour and a half after his arrest. In one scenario, Sweeney was not legally intoxicated at the time of the stop but he would have had to have drunk six to seven drinks immediately prior to the stop in order

to reach the 0.17 level at the time of the test. The second scenario posited that Sweeney already was well in excess of the legal limit at the time of the stop. But for Sweeney's plea of guilty, the jury would have heard that Doyle did not know Sweeney's drinking history, but that she did consider his height, weight and gender, and was familiar with standard elimination rates, and that when Sweeney was stopped he bore the strong odor of intoxicants, was unsteady and had glassy, bloodshot eyes. The jury also reasonably could have inferred that Sweeney failed the sobriety tests.

¶16 Clearly, then, the breath test result and Doyle's bifurcated opinion would not have been the only evidence of intoxication. A jury would have been free to consider Doyle's relevant opinions against the backdrop of these assembled facts and to reject or accept Doyle's hypotheses on credibility and reliability grounds. We agree with the trial court that under Wisconsin law this was a job for the factfinder, not for the court on a threshold basis.

## CONCLUSION

¶17 The trial court's decision denying Sweeney's motion to suppress Doyle's testimony represents a proper exercise of discretion. The court considered the relevant facts and Wisconsin law regarding the admission of scientific evidence and testimony. Doyle was a qualified expert, and the evidence was relevant and would have assisted the jury in determining a disputed fact. We affirm.

*By the Court.*—Judgment affirmed.

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