

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

January 17, 2001

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. 00-2078-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**LISA M. BERGER,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Washington County: DAVID C. RESHESKE, Judge. *Affirmed.*

¶1 BROWN, P.J.<sup>1</sup> Lisa M. Berger appeals from a judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

pursuant to WIS. STAT. § 346.63(1)(b). Upon appeal, Berger argues that the trial court erred in denying her discovery motion to inspect and test the breath testing device and her subsequent motion to suppress the results of the breath test. This court agrees with the trial court's decision that Berger's motion under WIS. STAT. § 345.421 to inspect and test the device was untimely and affirms.

¶2 On August 20, 1999, Berger was arrested for operating a motor vehicle while intoxicated, her second offense. An officer informed Berger of her rights under the implied consent law and requested that she take a breath test. Berger submitted. On November 18, 1999, Berger filed a discovery motion pursuant to WIS. STAT. § 345.421, seeking to inspect and test the Intoximeter device used to measure the alcohol concentration of her breath. At the January 4, 2000 hearing, the trial court found the § 345.421 motion to be untimely as it was not filed within ten days of the alleged violation. At trial, Berger was convicted of operating with a prohibited alcohol concentration and sentenced to seven days in the county jail.

¶3 The central issue in this case is whether the trial court erred in denying the WIS. STAT. § 345.421 motion as untimely. This statute applies to all traffic cases, both civil and criminal. *City of Lodi v. Hine*, 107 Wis. 2d 118, 122, 318 N.W.2d 383 (1982). Section 345.421 provides:

**Discovery.** Neither party is entitled to pretrial discovery except that if the defendant moves within 10 days after the alleged violation and shows cause therefor, the court may order that the defendant be allowed to inspect and test under s. 804.09 and under such conditions as the court prescribes, any devices used by the plaintiff to determine whether a violation has been committed, including without limitation, devices used to determine presence of alcohol in breath or body fluid or to measure speed, and may inspect under s. 804.09 the reports of experts relating to those devices.

In the case at bar, almost three months elapsed between the alleged violation and the motion. This court concurs with the trial court's decision that the motion was untimely.

¶4 Berger maintains that she can also seek to inspect the Intoximeter device under WIS. STAT. § 971.23, the general discovery statute. We disagree. As we read these statutes regarding time limits for invoking the rights of discovery and inspection, WIS. STAT. § 345.421 is more specific. Its strict time constraint, applicable only to traffic cases, is exclusive of the more general provisions of § 971.23. Where two statutes deal with the same subject matter, the more specific controls. *Schlosser v. Allis-Chalmers Corp.*, 65 Wis. 2d 153, 161, 222 N.W.2d 156 (1974).<sup>2</sup> We hold that Berger's due process rights were not violated because she failed to timely invoke § 345.421 and was thus barred from discovery.

*By the Court.*—Judgment affirmed.

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

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<sup>2</sup> In any event, Berger missed the deadline for filing under WIS. STAT. § 971.31 as well. It requires that motions be filed within ten days after the defendant's initial appearance, which, in this case, occurred on November 4, 1999. Yet Berger did not file her general discovery motion until November 18, 1999. Her insistence that she met this deadline is inexplicable.

