

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 26, 2007

David R. Schanker
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. 2007AP1127-CR

Cir. Ct. No. 2004CT493

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID J. VIENOLA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: DALE L. ENGLISH, Judge. *Affirmed.*

¶1 SNYDER, J.¹ David J. Vienola appeals from a judgment of conviction for a second offense of operating a motor vehicle with a prohibited alcohol concentration (PAC), contrary to WIS. STAT. § 346.63(1)(b). He contends that the circuit court erred when it allowed evidence of a chemical breath test result without requiring the State to offer evidence that the solution used to calibrate the test device was approved by the Wisconsin Department of Transportation. We disagree and affirm the judgment of the circuit court.

¶2 On June 13, 2004, Officer Ryan Waldschmidt of the Fond du Lac County Sheriff's Department stopped Vienola for speeding on his motorcycle. Waldschmidt noticed clues that Vienola may have been consuming alcoholic beverages and Vienola confirmed that he had consumed about six beers. Based upon Vienola's performance on field sobriety tests, Waldschmidt believed Vienola was operating the motorcycle while intoxicated and arrested him.

¶3 Officer Waldschmidt took Vienola to the county jail to administer an Intoximeter test. Vienola gave his consent for a chemical test of his breath. Waldschmidt administered two breath tests, which indicated an alcohol concentration of .109 and .107 respectively.

¶4 At trial, Vienola moved to suppress the results of the Intoximeter tests, arguing that the proper foundation for admission had not been laid. The circuit court disagreed and allowed the results into evidence. The case went to the jury and Vienola was convicted of driving with a PAC. He appeals from the judgment, arguing that the circuit court's evidentiary ruling was error.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise indicated.

¶5 The parties agree that this court reviews evidentiary rulings under the erroneous exercise of discretion standard. “As with other discretionary determinations, this court will uphold a decision to admit or exclude evidence if the circuit court examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion.” *Martindale v. Ripp*, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698.

¶6 Incident to arrest for drunk driving and certain other offenses, a police officer may request the driver to submit to a test of breath, blood, or urine. WIS. STAT. § 343.305(1)-(5). Section 343.305(6) establishes the requirements for the tests, with § 343.305(6)(b) providing:

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

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;
2. Certify the qualifications and competence of individuals to conduct the analysis;
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 under sub. (3)(a), (am), or (ar) before regular use of the equipment and periodically thereafter at intervals of not more than 120 days; and
4. Issue permits to individuals according to their qualifications.

¶7 The result of a test administered in accordance with WIS. STAT. § 343.305 is admissible in an action for PAC on the issue of whether the person was under the influence of an intoxicant, and it is given “prima facie effect” without the need for expert testimony in certain circumstances. Section

343.305(5)(d); *see also, e.g.*, WIS. STAT. § 885.235(1g)(c) (chemical analysis of person's breath is prima facie evidence that he or she was under the influence of an intoxicant and had the alcohol concentration as shown by the analysis). Evaluation and approval of breath test instruments is intended to ensure the results have the accuracy that is deserving of the prima facie effect given them without an expert testifying on the accuracy. *State v. Baldwin*, 212 Wis. 2d 245, 259-60, 569 N.W.2d 37 (Ct. App. 1997), *rev'd sub nom. on other grounds, State v. Busch*, 217 Wis. 2d 429, 576 N.W.2d 904 (1998).

¶8 To implement WIS. STAT. § 343.305(6)(b), the DOT has adopted WIS. ADMIN. CODE § Trans 311. Section Trans 311.10 sets procedures for testing and certifying the accuracy of breath alcohol test instruments. Vienola contends that the State failed to prove that it complied with § Trans 311.10(3), which states:

(3) Reference solutions for use in calibrating units shall have the approval of the chief of the chemical test section.

(a) Each reference solution shall be identified with a lot number.

(b) An assay report for each lot of reference solution shall be retained by the department specifying the amount of alcohol per milliliter of solution and the predicted result when used in a calibrating unit with a breath alcohol test instrument.

¶9 Breathalyzer technicians are required to conduct field inspections of breath alcohol test machines, *see* WIS. ADMIN. CODE § Trans 311.08(3)(c), and the resulting maintenance reports are sent to the Department of Transportation, where they are kept on file. Sellers of ampoules used in breath alcohol test instruments are required to send assay reports on each ampoule lot number to the DOT, which must keep those reports on file. *See* WIS. ADMIN. CODE § Trans 311.10(3)(b).

¶10 Vienola argues that because the State failed to introduce the assay report or any other evidence that the reference solution in the test instrument was approved by the department, the results of the tests should have been suppressed. He characterizes the assay report as a “foundational prerequisite” for admission of the test result. This is a misinterpretation of the relevant law.

¶11 In *City of New Berlin v. Wertz*, 105 Wis. 2d 670, 672 n.2, 314 N.W.2d 911 (Ct. App. 1981), the defendant sought to suppress the results of a breathalyzer test on grounds that the testing methods and procedures did not meet provisions of the administrative code requiring (a) continuous observation of the subject for twenty minutes prior to testing and (b) compliance of the “assay report” of the machine’s manufacturer with certain standards. There we explained that the proponent of a breath alcohol test result need not prove compliance with the administrative code. *Id.* We also stated that WIS. STAT. § 343.305(7) sets no conditions for the admissibility of the results of such a test. *Wertz*, 105 Wis. 2d at 673. Admission of the assay report, therefore, is not a “foundational prerequisite” to the admissibility of Vienola’s Intoximeter test results.

¶12 Vienola argues that the statutory purpose of the calibration standard analysis is to assure the accuracy of the tests. He contends that we will frustrate that purpose if we do not require the State to produce the assay reports or other evidence that the State complied with the administrative rules when testing the accuracy of the instrument. We disagree. Ample safeguards are built into the statutory scheme, and the record here includes an abundance of evidence demonstrating the probable accuracy of the Intoximeter results. Waldschmidt testified that he is a certified and experienced operator of the Intoximeter. Evidence indicates that the test card properly registered a .000 for each of the blank air tests; further, the test card shows that the Intoximeter registered a .079

for the assay solution, which properly falls within .01 grams of alcohol per 210 liters of the .08 reference value as required by WIS. ADMIN. CODE § Trans 311.10(1)(b). Finally, the Intoximeter passed an accuracy test at the .02 value on March 4, 2004, and passed an accuracy test at the .10 value on June 30, 2004. Vienola's Intoximeter tests fell between those two dates.

¶13 As we said in *Wertz*, circuit courts may, where the court is convinced “that the accuracy of the test is so questionable that its results are not probative,” or where “accuracy of the test is so questionable that its probative value is outweighed by its prejudicial effect,” properly refuse to admit the test in evidence even though there are “no legislatively imposed foundational prerequisites.” *Wertz*, 105 Wis. 2d at 675. Here, the circuit court considered Officer Waldschmidt's testimony regarding his qualifications to administer the tests and his testimony about the accuracy testing that was done on the Intoximeter prior to, during, and after Vienola's arrest. The court reached a reasonable conclusion, based on a correct view of the applicable law, that the chemical breath test results were admissible.

¶14 Vienola has not persuaded us that any case law, statute or administrative rule compels the evidentiary foundation he urges. Rather, we conclude that the State was not required to affirmatively prove that the Intoximeter had been tested as required by WIS. STAT. § 343.305(6)(b)3. or WIS. ADMIN. CODE § Trans 311.10. The circuit court did not err in ruling as it did.

By the Court.—Judgment affirmed.

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

