COURT OF APPEALS
DECISION
DATED AND FILED

March 27, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2281-CR **Cir. Ct. No. 99-CT-12**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM J. GRUBER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Ozaukee County: WALTER J. SWIETLIK, Judge. *Affirmed*.

¶1 ANDERSON, J.[1] We reject William J. Gruber's request that he be granted a new trial because the jury was not given the opportunity to consider important evidence that bore on an important issue. Gruber's contention that he was convicted with the use of unreliable evidence is premised on a proposed

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

attack on the accuracy of the Intoxilyzer 5000. Such an attack amounts to nothing more than a new theory of defense and does not justify a new trial in the interest of justice.

¶2 On November 28, 1988, Gruber was arrested for drunk driving; he submitted to a breath test using the Intoxilyzer 5000 located at the Cedarburg police department; his breath alcohol concentration was 0.09%, which was over the prohibited concentration for any driver with two or more drunk driving convictions. WIS. STAT. §§ 340.01(46m), 343.307(2). After a jury trial, Gruber was convicted and the trial court entered judgment on one count of operating a motor vehicle while intoxicated, third offense, WIS. STAT. §§ 346.63(1)(a) and 346.65(2)(c), and one count of operating a motor vehicle with an alcohol content exceeding 0.08%, §§ 346.63(1)(b) and 346.65(2)(c).

¶3 Gruber filed a timely motion for a new trial. In support of his motion, Gruber filed a letter from a forensic expert whose primary experience was with the Intoxilyzer 5000. The expert stated that based upon the serial number of the machine at the Cedarburg police department, it was one of the oldest Intoxilyzer 5000s in use in Wisconsin. The expert also stated that two years prior to Gruber submitting to the instant test, the Wisconsin State Patrol Chemical Test Section had lost faith in the accuracy of the Intoxilyzer 5000. According to the expert, since the date of Gruber's arrest all of the Intoxilyzer 5000s have been replaced by newer equipment. The expert also stated that under the Wisconsin Administrative Code all breath test equipment, including the Intoxilyzer 5000, must have an accuracy level of plus or minus 0.01. WIS. ADMIN. CODE § Trans 311.06(3)(c). The expert explained that if the tolerance level of plus or minus 0.01% were compared to Gruber's test results of 0.09, it would be possible that because of machine error Gruber could have been below 0.08 at the time of the

test. Finally, the expert opined that given the error rate acceptable to the State and the loss of precision and accuracy in an old Intoxilyzer 5000, Gruber would have been below a 0.08 at the time of the test. The trial court denied the request for a new trial, concluding that Gruber had waived the issue because he did not object to the admission of the results from the Intoxilyzer 5000 at trial and that the Intoxilyzer 5000 enjoys a presumption of accuracy. Gruber appeals.

¶4 Gruber recognizes that his failure to object to the admission of the results from the Intoxilyzer 5000 did not preserve the issue and he asks us to use our discretionary power to grant him a new trial. *See* ***Vollmer v. Luety***, 156 Wis. 2d 1, 20, 456 N.W.2d 797 (1990). He asks us to reverse his conviction and remand to the circuit court for a new trial. His sole claim before us is "that admission of unreliable evidence violated his right to due process; … because the jury heard evidence it should not have heard, the real controversy was not fully tried." Our discretionary power of reversal is found in WIS. STAT. § 752.35:

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

Under this statute, a new trial may be ordered in either of two ways: (1) whenever the real controversy has not been fully tried; or (2) whenever it is probable that justice has for any reason miscarried. Separate criteria exist for determining each of these two distinct situations.

¶5 There are two circumstances in which the real controversy has not been fully tried: (1) when the jury was erroneously not given the opportunity to consider important evidence that bore on an important issue in the case, and (2) when the jury had before it evidence not properly admitted which so clouded a crucial issue that it may fairly be said that the real controversy was not fully tried. ***State v. Johnson***, 149 Wis. 2d 418, 429, 439 N.W.2d 122 (1989), *conf'd on reconsideration*, 153 Wis. 2d 121, 449 N.W.2d 845 (1990). We have broad discretionary powers to reverse a judgment when either of these two circumstances are present and we exercise those powers without consideration of the trial court's decision. ***Vollmer***, 156 Wis. 2d at 19. In exercising our discretion, it is not necessary to consider whether a different result at trial is probable when seeking a new trial on the basis that the real controversy was not fully tried. ***State v. Wyss***, 124 Wis. 2d 681, 739, 370 N.W.2d 745 (1985), *overruled on other grounds by* ***State v. Poellinger***, 153 Wis. 2d 493, 451 N.W.2d 752 (1990).

¶6 Gruber contends that important evidence was kept from the jury—that the results from the Intoxilyzer 5000 are inherently unreliable. He claims the unreliability flows from the near obsolescence of the Intoxilyzer 5000 and the accuracy standards established for that machine. He also argues that the admission of the unreliable Intoxilyzer 5000 alcohol evidence was a violation of due process and the constitutional principle that a defendant must not be convicted on the basis of unreliable evidence.

¶7 Gruber's arguments ignore the proposition that the use of the Intoxilyzer 5000 was an approved method of testing pursuant to WIS. STAT. § 343.305(6)(b) and WIS. ADMIN. CODE § Trans 311.04. The legislature in § 343.305(6)(b) has delegated to the Department of Transportation (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, the DOT has promulgated rules for evaluating and approving that equipment. WIS. ADMIN. CODE § Trans 311.04. ***State v. Busch***, 217 Wis. 2d 429, 442, 576 N.W.2d 904 (1998). When a machine's method of testing has been recognized as accurate and complies with § 343.305(6)(b) and WIS. ADMN. CODE § Trans 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).

¶8 In ***Busch***, the supreme court wrote:

> In ***In re Suspension of Operating Privilege of Bardwell***, 83 Wis. 2d 891, 900, 266 N.W.2d 618 (1978), this court held that "[a] chemical test specified by a statute may not be deemed unreliable as a matter of law." Thus, a "recognized method[] of testing authorized by statute [is] entitled to a prima facie presumption of accuracy." ***State v. Disch***, 119 Wis. 2d 461, 475, 351 N.W.2d 492 (1984). Accordingly, if a breath alcohol instrument's "method[] of testing" has been recognized as accurate and complies with the specifications of WIS. STAT. § 343.305(6)(b) and WIS. ADMIN. CODE § TRANS 311.04, it is afforded a presumption that its test results are accurate and reliable. *See* ***id***.

Busch, 217 Wis. 2d at 443.

¶9 There is no evidence in the record that the DOT's certification of the Intoxilyzer 5000 has ever been withdrawn. While it may have been replaced by a new and improved breath-alcohol testing device, it has not had its certification revoked. Our own independent research has failed to turn up any information that

the DOT no longer finds that the Intoxilyzer 5000 meets the criteria for certification as an acceptable breath-alcohol testing machine. Because the Intoxilyzer 5000 is still approved by the DOT, Gruber's evidence cannot establish that at the time he took the test the machine he was tested on provided inherently unreliable breath alcohol evidence.

¶10 Gruber's evidence is nothing more than the history of breath-testing machines used in Wisconsin. At the most it would create a need for the jury to weigh the evidence to determine if Gruber had overcome the presumption of admissibility of the machine's breath-alcohol results. *See* ***City of New Berlin v. Wertz***, 105 Wis. 2d 670, 674, 314 N.W.2d 911 (Ct. App. 1981). We are satisfied that this is not a situation in which the probative value of the Intoxilyzer 5000's results is so questionable that the probative value of the results is outweighed by its prejudicial effect. ***Id***.

¶11 In ***City of New Berlin***, we sounded a cautionary note:

> Regardless of how the challenge is raised, the court must give careful consideration to the prima facie presumption of accuracy accorded the test by legislative enactment and case law in ruling on the test's admissibility. The court must also keep in mind that *generally an attack on* the qualifications of the operator, the methods of operation or *the accuracy of the equipment* is a matter of defense and goes to the weight to be accorded to the test and not to the test's admissibility.

Id. at 675 n.6 (emphasis added). The proposed evidence that the confluence of the obsolescence of the Intoxilyzer 5000 and the degree of accuracy required of breath-alcohol testing machines makes Gruber's results unreliable is nothing more than a new theory of defense that Gruber wishes to pursue in a new trial. Our reading of cases discussing a new trial in the interest of justice suggests that such action is limited to those instances where something has gone awry in the

proceeding that was conducted—not in a proceeding that never occurred. *See* ***Vollmer***, 156 Wis. 2d at 19-21.

¶12 Although uttered in a newly discovered evidence setting, we find applicable the words of our supreme court in ***Vara v. State***, 56 Wis. 2d 390, 393, 202 N.W.2d 10 (1972):

> By hindsight, appellate counsel wishes to retract the road of self-defense to the fork originally encountered and take the alternate road of insanity or lack of intent in hopes of an acquittal. We think the evidence shows the trial counsel made a tactical choice of defenses and effectively waived the defense now advanced. Unlike the traveler in the familiar Frost poem, an attorney cannot save the road not taken "for another day." (Citations and footnote omitted.)

¶13 We are unconvinced that Gruber's evidence reaches the level of being important evidence, whose absence from the trial prevented the jury from properly considering an important issue. We conclude that the real controversy has been tried and we decline to exercise our discretion and grant Gruber a new trial.

By the Court.—Judgment and order affirmed.

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