

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 3, 2002

Cornelia G. Clark
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. 02-0358
STATE OF WISCONSIN**

Cir. Ct. No. 01-TR-190

**IN COURT OF APPEALS
DISTRICT IV**

LA CROSSE COUNTY,

PLAINTIFF-RESPONDENT,

v.

DAVID W. WATTERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County:
MICHAEL J. MULROY, Judge. *Affirmed.*

¶1 ROGGENSACK, J.¹ David W. Watters appeals a judgment of conviction for operating a motor vehicle while intoxicated (OMVWI), in violation

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

of a La Crosse County ordinance adopting WIS. STAT. § 346.63(1)(a), as a first offense. His conviction arose out of his driving in the early morning hours of January 7, 2002, when Deputy Michael Valencia observed Watters's truck traveling at erratic speeds and began to follow it. Valencia observed Watters's truck cross the centerline twice. Valencia activated his squad's lights, but Watters did not stop or prepare to do so until Valencia had followed him for more than one-tenth of a mile and Watters pulled into a driveway and saw Valencia behind him.

¶2 On approaching Watters, Valencia noticed that Watters's eyes were very red and bloodshot and his pupils were dilated. Valencia asked Watters if he had been drinking and Watters said yes, that he had had six or eight beers that evening. Valencia noticed the odor of alcohol on Watters's breath and that his speech was slow, slightly slurred and raspy. Valencia then instructed Watters to conduct the horizontal gaze nystagmus test and the alphabet test while he was inside his vehicle. After Watters had unsuccessfully completed the first two tests, Valencia asked him to exit his vehicle to continue the field sobriety tests. When Watters failed to complete the field sobriety tests satisfactorily, he was asked to submit a sample of his breath for a preliminary breath test which showed an alcohol level of .159.

¶3 Watters was arrested for OMVWI and taken to St. Francis Medical Center for a blood draw. He was read the Informing the Accused Form and asked to submit a sample of his blood for testing, to which he agreed in writing on the form presented. The blood draw produced a blood alcohol level of .151, a prohibited alcohol concentration (PAC) for the driver of a motor vehicle under Wisconsin law.

¶4 Watters moved to suppress the results of the blood test. When the circuit court denied that request, he was tried to the court on stipulated facts contained in Record 19:1-15.² The circuit court found Watters guilty of OMVWI, and for the reasons set forth below, we affirm.

DISCUSSION

Standard of Review.

¶5 The facts relevant to Watters's conviction were stipulated. Therefore, whether those facts are sufficient to sustain Watters's conviction for OMVWI is a question of law that we review *de novo*. *Monroe County v. Kruse*, 76 Wis. 2d 126, 128, 250 N.W.2d 375, 376 (1977).

Conviction.

¶6 Watters appeals the judgment of conviction for OMVWI, a violation of WIS. STAT. § 346.63(1)(a),³ based on what he alleges were a warrantless, unreasonable blood draw and a warrantless blood test. In order to sustain its burden of proof for the OMVWI, the prosecution was required to establish that (1) Watters was operating a vehicle on the highway and (2) Watters was under the influence of intoxicants. *Kruse*, 76 Wis. 2d at 131, 250 N.W.2d at 377. The supreme court has recognized that a driver may have a PAC under § 346.63(1)(b) but not be under the influence of an intoxicant. *State v. Bohacheff*, 114 Wis. 2d 402, 415-16, 338 N.W.2d 466, 473 (1983). Therefore, a finding of guilt for

² Those same facts are the only facts used in this appeal.

³ While Watters was charged with violations of both WIS. STAT. §§ 346.63(1)(a) and 346.63(1)(b), he was convicted of violating only § 346.63(1)(a).

driving with a PAC is not necessarily intertwined with a finding of guilt for OMVWI. *See Id.*

¶7 On appeal for his conviction of OMVWI, Watters does not argue that he would not have been convicted of OMVWI if the suppression motion relating to the blood test had been granted, nor does he argue that the evidence contained within the stipulation of facts used by the circuit court and by this court is insufficient to support his conviction of OMVWI, without the results of the blood test. Therefore, the arguments that Watters presents in this appeal could not result in a reversal of his judgment of conviction for OMVWI, even if we were to accept his views as accurate statements of the law.

¶8 Accordingly, although the County argues with some conviction that Watters's conviction should be affirmed under our holdings in *State v. Thorstad*, 2000 WI App 199, 238 Wis. 2d 666, 618 N.W.2d 240 and *State v. VanLaarhoven*, 2001 WI App 275, 248 Wis. 2d 881, 637 N.W.2d 411, because we conclude that there is nothing in the arguments presented in this appeal that bears on the circuit court's judgment of conviction for a violation of WIS. STAT. § 346.63(1)(a), we do not analyze the applicability of *Thorstad* or *VanLaarhoven*, or any of the other cases relating to the Fourth Amendment issues raised by Watters. Instead, we affirm the judgment of the circuit court without further discussion.

By the Court.—Judgment affirmed.

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

