COURT OF APPEALS
DECISION
DATED AND FILED

February 11, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0943-CR **Cir. Ct. No. 00 CT 3650**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

STANLEY MONTELIUS,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: CARL ASHLEY, Judge. *Reversed and cause remanded with directions.*

¶1 WEDEMEYER, P.J.[1] The State of Wisconsin appeals from an order dismissing count two, operating a motor vehicle with a prohibited alcohol concentration of .1% or more, in a criminal complaint against Stanley Montelius, and suppressing all breath alcohol test evidence in the case. The State argues that

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (1999-2000).

the trial court erred when it ordered inspection and testing of the Breathalyzer device because Montelius failed to timely make the discovery request and failed to show good cause. Because this court concludes that the trial court erred when it declined to enforce the time and good cause requirements set forth in WIS. STAT. § 345.421 (1999-2000),[2] the order is reversed and cause remanded for further proceedings consistent with this opinion.

BACKGROUND

¶2 On April 28, 2000, Montelius was stopped and arrested for operating a motor vehicle while intoxicated. The arresting officer conducted field sobriety tests, which Montelius failed. The officer also administered a breath test with an Intoximeter, which indicated that Montelius's blood alcohol was .15%. Montelius was charged, by criminal complaint, with one count of operating a motor vehicle while under the influence of an intoxicant and one count of operating a motor vehicle with a prohibited alcohol concentration of .1% or more. This would be his second offense within a ten-year period.

¶3 Montelius appeared in court on June 27, 2000, and on July 14, 2000. He was given additional time to hire counsel. On August 25, 2000, Montelius appeared in court with counsel. On September 14, 2000, he moved the court to order inspection and testing of the Intoximeter, which was used to test his breath. The case proceeded through numerous proceedings and adjournments. During hearings on the discovery motion, the State objected to allowing the inspection because Montelius failed to file the motion within the time requirements set forth

[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

in WIS. STAT. § 345.421. The trial court found that although Montelius failed to comply with statutory time limits for inspection of the Intoximeter, the State failed to raise this issue in a timely manner.

¶4 In February 2002, the trial court ordered the testing requested by Montelius. The Intoximeter was not produced for testing and, on April 1, 2002, the trial court dismissed count two of the criminal complaint and suppressed all alcohol test evidence. The State appeals from this order.

DISCUSSION

¶5 The State contends that Montelius was not entitled to inspection of the Intoximeter used in this case because he failed to move for inspection within the ten-day statutory time period. *See* WIS. STAT. § 345.421. Montelius responds that strictly applying the statutory time period violates his due process rights, it should not be applied in criminal prosecutions, and it should not be applied here because the State tacitly agreed to cooperate with the discovery. Although this court can sympathize with Montelius's position, the statutory language is clear and must be applied as written.

¶6 The legislature enacted WIS. STAT. § 345.421, which provides in pertinent part:

> 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 to determine presence of alcohol in breath or body fluid ….

¶7 The language of the statute is clear and unambiguous and must be given its plain meaning. ***State v. Schoepp***, 204 Wis. 2d 266, 270-71, 554 N.W.2d

236 (Ct. App. 1996). Here, it is undisputed that the arrest occurred on April 28, 2000, and no request for inspection was filed until September 12, 2000. Clearly, Montelius failed to comply with the ten-day statutory time requirement. Thus, the trial court should have denied his request for inspection and discovery of the Intoximeter.

¶8 Further, this court must reject Montelius's contention that WIS. STAT. § 345.421 does not apply to this case because it is a criminal prosecution, rather than a civil one. In ***City of Lodi v. Hine***, 107 Wis. 2d 118, 122, 318 N.W.2d 383 (1982), our supreme court stated that the "legislature intended the use of [§ 345.421] in civil as well as criminal traffic charges …." Thus, Montelius's argument on this basis is rejected.[3]

¶9 This court must also reject his argument that the State waived the right to raise the timeliness of his discovery request because it initially indicated it would assist Montelius with the testing. The trial court ruled that the State's initial cooperation constituted waiver of its right to assert WIS. STAT. § 345.421. This court disagrees.

¶10 Although the record reflects that the State initially agreed to help Montelius with the inspection and testing of the Intoximeter, it changed its opinion after consulting with its experts. The State pointed out the controlling law to the trial court and advocated for the trial court to follow the law. Although this court

[3] Montelius argues that his case could only be charged as a criminal case and not as a civil one and, therefore, the ***City of Lodi v. Hine***, 107 Wis. 2d 118, 318 N.W.2d 383 (1982) language does not apply to him. This court disagrees with that contention. Moreover, Montelius argues that the statute conflicts with local rules. It is not the role of this court to resolve conflicts between the statutes and local court rules. This court must apply the statutes enacted by our legislature.

can understand Montelius's frustration with the State's decision to object rather than assist, there is no legal prohibition for the State's action.

¶11 Finally, there is another independent reason for rejecting Montelius's suggestion that the trial court correctly ordered inspection of the Intoximeter. WISCONSIN STAT. § 345.421 requires a defendant to make a timely request and to *show good cause*. Here, the trial court never found that the second requirement was satisfied. Montelius's response to this failure is that his constitutional due process rights override "narrowly drawn state discovery rules." He goes on to cite one federal case and an Alabama supreme court case, ***Barnard v. Henderson***, 514 F.2d 744 (5th Cir. 1975) and ***Warren v. State***, 288 So. 2d 826 (Ala. 1973) for the propositions that fundamental fairness and due process demand that an individual facing the loss of liberty has the right to examine "critical evidence," ***Barnard***, 514 F.2d at 746, and test the "authenticity of the State's evidence," ***Warren***, 288 So. 2d at 830.

¶12 Although this court does not disagree with those general statements, neither case governs here. As the State points out, the evidence involved in those two cases is not the same as the Intoximeter here. In ***Barnard***, the court held that Barnard was entitled to have his expert inspect the murder weapon and bullet. ***Id.*** at 746. The court ruled this was essential because the most damaging piece of evidence against Barnard was "the identification of the murder bullet as having been fired by a .22 Ruger pistol," which Barnard possessed. ***Id.*** The court was particularly concerned because the identification was made even though seventy-five percent of the bullet was destroyed, which left only twenty-five percent to examine. ***Id.*** The pistol and bullet, however, in ***Barnard*** would not be the equivalent of the Intoximeter in the instant case. Rather, the Intoximeter would be analogous to the microscope used to examine the bullet fragment.

¶13 Similarly, the court in ***Warren*** held that Warren "should be furnished a sample of the allegedly prohibited substance" to be used against him so he could have his own expert test it. ***Warren***, 288 So. 2d at 830. Again, the prohibited substance in ***Warren*** would not equate with the Intoximeter here. Rather, the chemicals used to test the prohibited substance would be the equivalent to the Intoximeter. Accordingly, this court is not persuaded by the cases Montelius cites in support of his constitutional argument.

¶14 Montelius fails to offer any additional argument in response to the State's contention that the trial court failed to find that the "good cause" requirement of WIS. STAT. § 345.421 was satisfied. This court, therefore, independently concludes that this is an alternative reason to hold that the trial court erred when it dismissed count two of the criminal complaint and ordered suppression of the breath test results.

¶15 Based on the foregoing, the trial court's order is reversed and this case is remanded for further proceedings consistent with this opinion.

By the Court.—Order reversed and cause remanded with directions.

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