COURT OF APPEALS
DECISION
DATED AND FILED

January 29, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1946-CR **Cir. Ct. No. 01-CT-526**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WADE J. REX,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed.*

¶1 BROWN, J.[1] Wade J. Rex was found guilty by a jury of operating a motor vehicle while intoxicated. He raises three issues: (1) Whether his pretrial motion to suppress should have been granted on grounds that the officer had no

[1] This appeal is decided by one judge 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.

reasonable suspicion to stop him, (2) Whether the trial court erred when ruling that an "automatic admissibility" issue should be resolved at trial rather than by pretrial motion, and (3) Whether the trial court erroneously exercised its discretion by permitting the State to cross-examine his expert witness about a threat the witness allegedly made to a co-worker when the expert was employed by the Chemical Test Section of the Wisconsin State Patrol. We address each issue seriatim and affirm.

REASONABLE SUSPICION TO STOP

¶2 On June 21, 2001, at approximately 11:50 p.m., a village of Silver Lake police officer observed an operator of a motor vehicle driving erratically through the village. The first thing that drew the officer's attention to the operator was when he observed the operator make a left-hand turn onto a side street from a county highway. The officer testified that when the operator made the turn, the operator "came down almost to the curb line on the driver's side of the vehicle, which struck me as kind of, you know, unusual in making the turn." The officer began to follow the vehicle. The officer then observed that at the next cross street, the operator signaled for a left turn, but made a right turn. Then the operator went to the next intersection and again made a signal for a left turn, but made a right turn. Then the operator went back to the county highway, which is where he started in the first place. The officer observed that the operator was deviating within the lane of traffic from the fog line to the center line and back. The officer testified: "There is some curvy road through the village so I gave him the benefit of the doubt and waited until he was on a straight-a-way to determine whether or not I felt he was deviating within the lane or if he was going to go over." Based on these observations, the officer stopped the vehicle. The operator turned out to be Rex. He had the odor of alcohol on his breath and slurred his words. He failed

the field sobriety tests and was arrested for operating a motor vehicle while intoxicated. He agreed to take the intoximeter test and the result was a blood alcohol level of .19 %.

¶3 Prior to trial, Rex moved to suppress all evidence and statements taken from him at the scene of his detention and arrest, all observations made by the officer after the stop, any and all physical tests, and any other evidence procured as a result of the detention. The trial court heard the testimony and denied the motion. After being found guilty by a jury of operating while intoxicated, he commenced this appeal.

¶4 Rex's main theme is that none of his operating episodes violated the law. Rex argues that it is permissible to weave within one's lane of traffic, it is permissible to make a turn the way he made the left turn and it is even permissible to signal one's intention to turn in one direction but end up going in the opposite direction, so long as no other traffic is affected. Rex posits that not only was his behavior lawful, it was not unsafe under the facts of the case. He claims that before an officer may stop a vehicle, the officer must believe that the person operating the suspect vehicle be "incapable of safely driving." He cites WIS. STAT. § 346.63(1)(a) for this proposition. Rex argues that he safely deviated in his own lane of travel, did not endanger any other traffic with erroneous signaling and did not endanger anyone when he turned left. Thus, he was not shown to be "incapable of safely driving" and the officer had no reason to stop him.

¶5 First, an officer need not have evidence that a driver is endangering someone before making a stop. That is not a prerequisite. The law is as defined in ***Terry v. Ohio***, 392 U.S. 1 (1968). An officer may stop a person if the officer suspects that the person is committing, is about to commit or has committed a

crime. *See* ***id.*** at 26. If a person makes a left turn such that the automobile almost hits the curb, then twice signals for a left turn and instead turns right, and then is seen weaving within his or her own lane of traffic, a reasonable police officer would suspect that the person is not safely controlling the automobile. A person who is not safely controlling the automobile is at serious risk to harm oneself or another. The poor driving and poor decision making create a reasonable suspicion that the driver may lack the requisite control to drive a car in a safe manner. That information is all that is necessary to make a valid stop.

¶6 Second, it matters not that each of the incidents were, by themselves, lawful activity. Officers are not required to rule out plausibly innocent behavior. *See* ***State v. Fields***, 2000 WI App 218, ¶10, 239 Wis. 2d 38, 619 N.W.2d 279. Officers look to the totality of the circumstances to determine whether the driver should be stopped. *See* ***State v. Waldner***, 206 Wis. 2d 51, 53, 556 N.W.2d 681 (1996). Here, when the officer added up the shallow turn, the two occasions of contradictory signaling and the weaving in the lane, the officer could infer that the activity was suspicious of impaired driving. In ***State v. Jackson***, 147 Wis. 2d 824, 835, 434 N.W.2d 386 (1989), our supreme court wrote:

> Doubtless, many innocent explanations for [the defendant's] conduct could be hypothesized, but suspicious activity by its very nature is ambiguous. Indeed, the principal function of the investigative stop is to quickly resolve the ambiguity and establish whether the suspect's activity is legal or illegal…. We conclude that if any reasonable suspicion of past, present or future criminal conduct can be drawn from the circumstances, notwithstanding the existence of other inferences that can be drawn, officers have the right to temporarily freeze the situation in order to investigate further.

Here, the officer was suspicious of Rex based on Rex's conduct behind the wheel. The officer had a perfect right to stop Rex, freeze his driving activity for a

reasonable period of time, and determine if there was probable cause to believe that Rex was operating a vehicle while intoxicated or if there was some other, innocent explanation for his conduct.

THE "AUTOMATIC ADMISSIBILITY" ISSUE

¶7 Prior to trial, Rex filed evidentiary motions, including a motion entitled "Notice of Motion and Motion to Preclude Reliance on Presumptions of Automatic Admissibility Otherwise Associated with a Test Under WIS. STAT. § 343.305." The motion alleged that the arresting officer failed to comply with the rigors of the implied consent law. At trial, Rex's counsel referred to the motion as a "***Zielke*** motion"[2] for reasons which will be shortly made clear. In his brief to this court, Rex asserts that had he prevailed on this motion, at a minimum, the remedy would have involved the State losing the presumption of automatic admissibility otherwise associated with a chemical test.

¶8 The genesis of Rex's complaint comes from what occurred at a certain stage of the pretrial hearing. Rex's counsel was beginning to cross-examine the arresting officer about the subject's test record from the intoximeter machine. The court interjected and stated:

> Now, let me just say this, I don't want to address today the motion that you have made about the test not having been given in compliance with the statutory wordage and all that because that's a trial issue. Your motion to suppress is a pretrial issue. The other issue is not. That's something that the State has to prove at trial and you can make your motion at trial.
>
> ….

[2] ***State v. Zielke***, 137 Wis. 2d 39, 403 N.W.2d 427 (1987).

> And before I would instruct the jury that it is given any presumption at all, the district attorney will have to prove that it was administered in accordance with the law. That's an issue to be dealt with at the trial, not the pretrial.

Rex argues that the trial court was wrong and that all issues asserting a violation of procedure in the implied consent law are handled by pretrial motion. He lists a plethora of cases, which he submits, proves that all such issues are determined pretrial.

¶9 We hardly know where to begin. So, we will begin at the beginning. As long ago as 1973, our supreme court recognized that tests by recognized methods, such as a speedometer, a breathalyzer and radar, should not need to be proved for reliability in every case. ***State v. Trailer Serv., Inc.***, 61 Wis. 2d 400, 408, 212 N.W.2d 683 (1973). These methods of measurement carry a presumption of accuracy; if the validity of basic tests had to be a matter of evidence in every instance, the administration of the law would be seriously frustrated. *See* ***id***. Whether the test was properly conducted or the instruments used were in working order is a matter for the defense. ***Id***.

¶10 The ***Trailer Service*** case was subsequently followed by ***City of New Berlin v. Wertz***, 105 Wis. 2d 670, 314 N.W.2d 911 (Ct. App. 1981). This court determined that compliance with administrative code procedures was not required as a foundation for the admissibility of breathalyzer results. *See* ***id***. at 674. We noted that "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. We defined the term "presumption of accuracy" to mean that the State was not required to prove the accuracy and reliability of breathalyzer tests. *See* ***id.*** at 674.

¶11 The statutes underscore the correctness of these holdings. WISCONSIN STAT. § 343.305(5)(d) states, in relevant part, "the results of a test administered in accordance with this section are admissible on the issue of whether the person was under the influence of an intoxicant … or any issue relating to the person's alcohol concentration." WISCONSIN STAT. § 885.235(1g) provides automatic admissibility for chemical tests completed by a qualified agency and administered within three hours of driving.

¶12 The Wisconsin Jury Instructions reflect the law and let jurors know that there is a presumption of accuracy attendant to chemical tests when the proper procedures have been followed. WISCONSIN JI—CRIMINAL 232 tells jurors:

> The law recognizes that the testing device in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.

This same instruction is part of the standard jury instruction for operating a motor vehicle while intoxicated, WIS JI—CRIMINAL 2663. Therefore, if all of the procedures are followed, the State is afforded a presumption that the breath test is reliable and accurate. In other words, the test is "automatically admissible." It is up to the defense to attack the accuracy.

¶13 But what if the procedures are not followed? The supreme court answered that question in ***State v. Zielke***, 137 Wis. 2d 39, 403 N.W.2d 427 (1987). There, the police obtained a blood sample from the defendant without following the procedures set forth in the implied consent law. ***Id.*** at 40. The trial court ordered that the remedy was to suppress the results of the blood test. ***Id.*** at 40-41.

The supreme court reversed. ***Id.*** at 41. The court held: "If the procedures set forth in sec. 343.305, Stats., are not followed the State not only forfeits its opportunity to revoke a driver's license for refusing to submit to a chemical test, it also loses its right to rely on the automatic admissibility provisions of the law …." ***Zielke***, 137 Wis. 2d at 49. The court was explicit in its ruling that failure to comply with the implied consent law does not render a blood sample inadmissible at a subsequent criminal prosecution. ***Id.*** at 52. Thus, ***Zielke*** stands for the proposition that if the procedures of the implied consent law are not followed, the State cannot rely on the favorable statutory presumptions concerning admissibility of chemical test results set forth in the statutes. ***Id.*** at 54. It is obvious that Rex's attorneys know this to be the law since two of his attorneys referred to the motion as a "***Zielke*** motion" at trial.

¶14 When there is no violation of the implied consent law, then the applicable case law holds that a presumption of reliability and accuracy pertains and it is up to the defense to attack the credibility of the results. It is a credibility question rather than an admissibility question. ***Wertz***, 105 Wis. 2d at 674. But when there has been a violation, it follows that it is still a question of credibility, but it is for the State to meet the burden of showing that the test results are reliable and accurate. The State may no longer rely on the presumption. The playing field is even. As such, the State must put in evidence to convince the fact finder that the test results were reliable and accurate. Moreover, the State is not entitled to the instruction telling the jury about a presumption of reliability.

¶15 It was thus not a misuse of discretion for the trial court to reserve the "automatic admissibility" issue for trial. At trial, it was up to Rex to place into evidence information that the implied consent procedures were not followed. He would then be entitled to move at the instructions conference that the State not

have the benefit of the presumption that the test results are automatically admissible. The trial court would then be obligated at that time to rule on whether the presumption had been lost by reason of noncompliance with the implied consent law.

¶16 We reviewed the transcript and found that events occurred in exactly that way. At trial, the Informing the Accused form read to Rex was placed into evidence by the State. This form was signed by the officer who administered the information to Rex. There is a line where the officer is obligated to indicate the "date and time signed." On that line, the officer wrote "01.05 a.m. June 22, 2001." Another exhibit admitted into evidence at the request of Rex was the test results form. The test form indicated that the test on Rex's breath took place at 12:59 a.m.

¶17 Based on these documents, at the jury instructions conference, Rex's attorneys argued that the implied consent law procedure had not been followed because the form was read to Rex after the test took place. In other words, Rex's attorneys equated the time the officer wrote down on the implied consent form with the time the form was actually read to Rex. Thus, the form was read after the test, contrary to the implied consent law. Rex's attorneys argued that the presumption instruction should not be given to the jury as a sanction for noncompliance with the implied consent law as per ***Zielke***. The trial court rejected the argument. It reasoned that the "date and time" line did not refer to the time that the officer read the form to Rex, but to the time the officer signed the form. The court found nothing inconsistent between the two exhibits.

¶18 Thus, based on the record, Rex got exactly what he asked for—a chance to persuade the trial court that the presumption instruction should not be

given to the jury. Rex was able to point to the two items of evidence that he felt showed noncompliance with the implied consent law. He was allowed to make an argument to the court at the instructions conference when it really mattered and he got a decision from the court. We fail to understand how he did not get what he set out to do by his pretrial motion. He does not claim that the trial court was wrong in its decision. He simply claims that the decision should have been made at the pretrial motion stage. But, he fails to convince us that he has been prejudiced in any way by the procedure the trial court utilized.

¶19 We could stop here. But we will not. In Rex's brief-in-chief, he posits that "automatic admissibility" issues have historically been resolved at pretrial rather than trial. He lists a host of cases in support of his proposition. But in every one of these cases except one, the issue was refusal rather than "automatic admissibility." This is a distinction with a difference. In ***Zielke***, the supreme court painstakingly delineated the difference between refusal issues and automatic admissibility issues. The court said that "[t]he refusal procedures set forth in sec. 343.305, Stats., are separate and distinct from prosecution for the offense involving intoxicated use of a vehicle." ***Zielke***, 137 Wis. 2d at 47.

¶20 Thus, depending on whether the suspect has refused or submitted to the chemical test, the supreme court has carved out different sanctions when the implied consent law is not followed. When the suspect refuses a test, the State may not revoke the operator's license under the implied consent law and it may not use evidence of the refusal in the underlying OWI prosecution. However, when the suspect takes the test, the State loses the automatic admissibility of the results.

¶21 When an operator refuses to take the test but is charged with OWI anyway, and the operator contests both, two separate court proceedings occur. The refusal hearing is set and heard before the trial because if the operator is found to have reasonably refused, the State may not use the fact of refusal at the OWI trial. But while the refusal hearing is before the trial, it is not a "pretrial hearing" in the same sense that a motion to suppress is a "pretrial hearing." Thus, it is incorrect to use these refusal hearing cases as support for the proposition that our appellate courts have sub silentio determined that "automatic admissibility" issues are decided by pretrial motions.

¶22 The one case cited by Rex that was not a refusal case is ***Village of Oregon v. Bryant***, 188 Wis. 2d 680, 524 N.W.2d 635 (1994). This case was actually a consolidation of three cases all having the same issue. In all three cases, the defendants submitted to the breath test. So, refusal was not at issue. But these cases were not "automatic admissibility" cases either. They were due process cases. Moreover, while the opinion speaks of motions to suppress, there is no discussion in the opinion about whether "automatic admissibility" issues must be the subject of a pretrial motion. The case is not authority for the proposition Rex advances here.

¶23 Consequently, there is no authority in this state that "automatic admissibility" issues must be determined by pretrial motion. Now, having said that, we do understand Rex's position. He obviously believes that the question of whether the implied consent law was followed should be decided by the trial court by pretrial motion because, if the court rules in the defendant's favor, the defendant can then prepare for trial knowing that the State has no presumption and must present evidence that the test results are credible. Moreover, the defendant

can also prepare for trial knowing that there will be no presumption instruction given to the jury.

¶24 But there is no law that says the court must do it this way. WISCONSIN STAT. § 971.31(2) is irrelevant when it comes to "automatic admissibility" issues. We are left with the common law. The common law is that the conduct of a trial is subject to the exercise of sound judicial discretion by the trial court and its determinations will not be disturbed unless the rights of the parties have been prejudiced. ***Dutcher v. Phoenix Ins. Co.***, 37 Wis. 2d 591, 606, 155 N.W.2d 609 (1968). We have heretofore concluded that there was no misuse of discretion here. In fact, Rex got what he wanted, which was a forum to air his argument and a tribunal to decide whether his argument was to be accepted. Not only did he get what he wanted, but he got it in "real time" at the conclusion of the trial when the testimony was still hot and the issue was clear in everyone's mind.

IMPEACHMENT OF REX'S EXPERT WITNESS

¶25 A large part of Rex's case centered on the credibility of the test results. In support of his theory that the .19 reading was off the mark, Rex called an expert witness, Mary C. McMurray. McMurray testified that she was formerly employed by the Chemical Test Section of the Wisconsin State Patrol. She testified that the machine was not working correctly and gave her opinion as to why.

¶26 During cross-examination, the State sought to impeach McMurray's testimony by showing that she had a bias against the Chemical Test Section by reason of her less than amicable departure. It was the State's position that McMurray's resignation from the test section was brought about by an incident involving a secretary and that McMurray had threatened to kill this particular

secretary. The State maintained that, as a result of this incident, McMurray was confronted by her supervisor, was forced to undergo a psychological evaluation, was required to take leave with pay for a number of months, and was foreclosed upon her return from going to the fifth floor where the secretary worked. In the State's view, this hostile environment was what drove McMurray to resign and caused her to have a "huge chip on her shoulder" against the Chemical Test Section, which bias clouded her judgment in reviewing the Chemical Test Section's work.

¶27 With this theory in mind, the State began to cross-examine McMurray about the incident involving the secretary. The State asked her whether the reason she resigned from her position with the State was because she was going to be facing a significant disciplinary action because of her threat. This question was objected to by Rex on the basis that it was irrelevant and argumentative. The trial court sent the jury out to lunch and conducted a hearing, including voir dire of McMurray, to determine how it should rule on the objection. During this voir dire, and while still under oath, McMurray denied that the State's account of the incident was accurate. But McMurray also conceded that she had resigned because of "an extremely hostile environment by my co-workers and my superiors." At the conclusion of the hearing, the court ruled that the State would not be allowed to cross-examine McMurray about the incident involving the alleged threat to the secretary. However, the court also ruled that the State would be able to cross-examine McMurray about how the hostile work environment caused her to resign.

¶28 When the jury came back from lunch, the court announced that the last question asked by the district attorney was sustained. The district attorney then continued his cross-examination and confined his questions concerning

McMurray's possible bias to her concession that a hostile work environment led her to resign. On redirect, Rex asked the following question: "Does the fact that you used to be an employee of the State of Wisconsin and left Wisconsin maybe under not the most happiest of circumstances, does that in any way affect the fact that you are telling the truth here under oath?" McMurray replied: "Does it affect my telling the truth? No, Sir. In fact, when I worked there, they accused me of being too honest."

¶29 After redirect, the State began recross. The district attorney asked: "In point of fact, when you worked there, they also accused you of saying you were going to kill a secretary, isn't that true?" Rex objected on grounds that "[w]e have already been through that." But the court responded: "She added something on the end there that opened all kind of doors." Following this ruling by the court, the district attorney went into the incident involving the secretary.

¶30 Now on appeal, Rex argues that the incident involving the secretary was a collateral attack on his witness's credibility and is thus governed by WIS. STAT. § 906.08. This rule states that the credibility of a witness may be attacked but only in respect to the witness's "character for truthfulness or untruthfulness." Sec. 906.08(1). Specific instances of the conduct of a witness for the purpose of attacking credibility may only be proved by extrinsic evidence if: (1) probative of truthfulness or untruthfulness and (2) are not remote in time. Rex argues that whether McMurray threatened the secretary has nothing to do with her character for telling the truth. Moreover, the court never made any determination regarding remoteness in time. Therefore, Rex seeks reversal on grounds that the court misused its discretion in allowing the threat evidence under this statute. Alternatively, Rex claims that the testimony was irrelevant to the issue of bias.

¶31 We will not address the WIS. STAT. § 906.08 issue. It was never the basis of Rex's objection at trial and is waived. That is obviously the reason why the court never addressed the remoteness issue. It was never before the court. The relevancy claim is, however, properly before this court for review. It was the basis for Rex's objection. As to this issue, we note that the trial court initially agreed with Rex that the threat incident was irrelevant to the question of whether McMurray was biased. Several times in the transcript, the trial court explained to the district attorney that whether the threat incident occurred or not, it had nothing to do with whether she was biased against the Chemical Test Section.

¶32 But all that changed when McMurray volunteered that the reason why she left under not the most happiest of circumstances was because the State "accused me of being too honest." Up to that point, all the State could adduce from McMurray was that she had left due to a hostile environment. McMurray's answer gave the reason for the hostile attitude by her co-workers and supervisors—she was too honest. McMurray's self-serving statement, if left untouched, would tell the jury that the hostile environment could not be the basis for bias on her part because, as the State points out in its brief, the reason for her leaving was a "compliment" to her. Faced with the picture McMurray had now painted for the jury, the State had the right to explore whether there was, in fact, a different picture that should be painted. Recross was permissible because the evidence elicited would directly impeach McMurray's credibility on the issue of why she was subjected to a hostile work environment. As such, the trial court did not misuse its discretion when it ruled that McMurray's answer had opened the door.

By the Court.—Judgment and order affirmed.

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